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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 535

TRANSIT COMMISSION AND THE STATE OF NEW YORK, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND THE INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED DECEMBER 2, 1932

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 66258

TRANSIT COMMISSION, Petitioner,

versus

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY and The Pennsylvania Railroad Company, Respondents

PETITION—Filed March 21, 1932

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your petitioner, more fully described hereinafter, brings this petition against the United States of America, under the Act of Congress, approved October 22, 1913, 28 U. S. C. A. 41 (28), 43-48, and pursuant thereto hereby sues to enjoin, set aside, suspend and annul a certificate or order of the Interstate Commerce Commission in a proceeding designated as Finance Docket No. 7308, entered February 8, 1932, whereby it is certified that the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company between Harold Avenue in Sunnyside Yard and the Penn-[fol. 3] sylvania Station, New York, N. Y., including the joint use of said yard, station and certain appurtenant facilities, provided, and upon the express condition, that the terms and conditions under which said operation is carried on be modified in the respects and to the extent therein indicated; and in support thereof petitioner respectfully shows to the Court:

1. The Transit Commission was created by and exists under and by virtue of the laws of the State of New York; has its office at No. 270 Madison Avenue, in the Borough of Manhattan, City, County and State of New York; is

composed of William G. Fullen, Chairman, Leon G. Godley and Reuben L. Haskell, Commissioners, all duly appointed, qualified and acting as such, all of whom are citizens and two of whom are residents of the Southern District of New York; and is a public regulating body of the State of New York with powers of supervision and regulation over certain railroad and other transportation corporations, including the respondent The Long Island Railroad Company, and the Pennsylvania Tunnel and Terminal Railroad Company, and is charged with the duty of enforcing the obligations imposed by law on carriers subject to its jurisdiction.

2. The respondent The Long Island Railroad Company (hereinafter designated as the Long Island) is a railroad corporation organized and existing under the laws of the State of New York, with its principal office in the Pennsylvania Station in the Borough of Manhattan, City, County and State of New York.

3. The Pennsylvania Railroad Company (hereinafter designated as the Pennsylvania) is a railroad corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and, since 1910, has operated the property of the Pennsylvania Tunnel and Terminal Railroad Company.

[fol. 4] 4. The Pennsylvania Tunnel and Terminal Railroad Company (hereinafter designated as the Terminal Company) is a corporation formed by the consolidation and merger of the Pennsylvania, New York and Long Island Railroad Company, a New York corporation, and the Pennsylvania, New Jersey and New York Railroad Company, a New Jersey corporation, and is the owner of the Pennsylvania Station, in the Borough of Manhattan, City and State of New York, and of a line of railroad, connected therewith, extending from Kearny, New Jersey, to Hoboken, New Jersey, thence by tunnels under the Hudson River to and across the Borough of Manhattan, City and State of New York, and under the East River by tunnels to Harold Avenue in the Sunnyside Yard in the Borough of Queens, City and State of New York, with a short branch from near the westerly end of the line to Harrison, New Jersey.

5. The Pennsylvania owns all the capital stock of the Terminal Company and practically all the capital stock of the Long Island.

6. In 1910, upon the completion of the Pennsylvania Station, the Pennsylvania undertook the operation of the said terminal property, as agent for the Terminal Company; and the Terminal Company and the Pennsylvania, as its agent, granted to the Long Island the right to use certain portions of the track and facilities, east of Tenth Avenue, Manhattan, under an agreement conferring trackage rights upon the Long Island, which agreement received the approval of the Public Service Commission for the First District of the State of New York.

7. The rental payable by the Long Island to the Pennsylvania in return for said trackage rights was, in 1912, 1920 and 1922, increased by agreements approved by the Public Service Commission for the First District or by its successor, the Transit Commission.

[fol. 5] 8. In 1923, application was made to the Transit Commission for the approval of a trackage agreement which would have increased the rental then payable by the Long Island by over $1,000,000; and concurrently the Long Island sought to increase the commutation fares on its suburban lines within the city. Under this proposed agreement the Long Island was to be required to pay as rental a proportion of the operating expenses, taxes and interest on the joint facility property, including the cost of the Pennsylvania Station building above the track level, the said proportion being based on the number of cars operated respectively by the Long Island and by the Pennsylvania, and the said interest being computed on the investment value of the joint facility property other than the electrical distributing system, at the rate of 4 per cent., and on the value of the electrical distributing system, at the rate of 4½ per cent. The Transit Commission denied this application and disapproved the proposed agreement.

9. In March, 1925, application was made to the Transit Commission for the approval of a trackage agreement, which eliminated from the investment base the sum of $15,000,000, as representing the station building above the track level, thus reducing the amount of the operating ex-

penses, taxes and interest in which the Long Island would be required to share; but at the same time increased the interest rate on the remainder of the investment base from 4 per cent to 5 per cent. In May, 1925, the Transit Commission disapproved this proposed increase in the interest rate; but on July 28, 1925, approved an agreement which reduced the interest rate to 4 per cent., and permitted the agreement so approved to become retroactive to July 1, 1923. This is the agreement under which operation is now carried on.

10. In December, 1925, the Transit Commission denied an application for the approval of an agreement which [fol. 6] would have increased the interest rate to 6 per cent., but approved an extension of the agreement, not otherwise modified, for one year from January 1, 1926.

11. The rental payable by the Long Island to the Pennsylvania for said trackage rights has, with the approval of the Transit Commission or its predecessor, increased from the sum of $519,173 in 1911 to the sum of $2,918,197 in 1930.

12. Since 1910, the said operation by the Long Island under trackage rights has been continuous and has been conducted according to terms and conditions contained in agreements approved by the Transit Company or by its predecessor.

13. In 1929, the Pennsylvania and the Long Island made application to the Interstate Commerce Commission, under paragraph (18) of Section 1 of the Interstate Commerce Act, for a certificate of public convenience and necessity authorizing the latter company to operate, under trackage rights, over that portion of the Terminal Company's railroad from Harold Avenue, in Sunnyside Yard, to Pennsylvania Station, including the use of said yard and station and the facilities and appurtenances thereof, and for an order, under paragraph (4) of Section 3 of said Act, requiring the use of said tracks and terminal facilities by the Long Island on terms and for compensation agreed upon by the Pennsylvania and the Long Island in an agreement dated November 13, 1928, which restored to the investment base the cost of the station building above the

track level and increased the interest rate thereon from 4 per cent. to 6 per cent.

14. Thereafter the Interstate Commerce Commission made an order permitting the Transit Commission to intervene in the proceeding on said application, known as Finance Docket No. 7308, and to be treated as a party [fol. 7] thereto; and the said Transit Commission did intervene and participated as a party throughout all the proceedings in said Finance Docket No. 7308.

15. On March 18, 1930, Division 4 of said Interstate Commerce Commission, in its case known as Finance Docket No. 7308, entered an order dismissing so much of the said application as was made under Section 3 (4) of the Interstate Commerce Act, and denying, without prejudice, so much of the said application as was made under Section 1 (18) of said Act. In its report which is referred to in, and made a part of, the said order, it found (162 I. C. C. 218, 236) that:

"Upon the facts presented we find that the present and future public convenience and necessity require the continued operation by the Long Island, under trackage rights, over the railroad of the Terminal Company as described in the record, but that the terms of the agreement dated November 13, 1928, proposed to govern such operation, are not just and reasonable. An order will be entered denying that part of the application which is under section 1 (18) of the act, without prejudice to the submission of a modified contract, and dismissing that part of the application which requests an order under section 3 (4)."

16. On December 27, 1930, the Pennsylvania and the Long Island made application to the Interstate Commerce Commission for a certificate, under Section 1 (18) of the Interstate Commerce Act, authorizing the Long Island to operate into the Pennsylvania Station, on the terms and for the compensation agreed upon by the Pennsylvania and the Long Island, as set forth in a contract dated December 23, 1930, which eliminated from the investment base the sum of $15,000,000, as representing the station building above the track level, required the Long Island to pay 20 per cent. of the operating expenses of the station building, and fixed the rate of interest at 5¾ per cent.

[fol. 8] 17. On February 8, 1932, Division 4 of the Interstate Commerce Commission adopted an order in its case, Finance Docket No. 7308, which provided:

"It is hereby certified, That the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue in Sunnyside yard, and the Pennsylvania station, New York, N. Y., including the joint use of said yard, station, and appurtenant facilities described in the record, under the terms and conditions of the proposed joint operating agreement dated December 23, 1930; Provided, however, and this certificate is issued upon the express condition, that said terms and conditions be modified in the respects and to the extent indicated in the accompanying report, to wit: In ascertaining currently the rental payable, additions and betterments to the Pennsylvania station building and service plant made subsequent to July 1, 1928, shall be excluded; the term of the aforesaid agreement shall be five years, with provision for its extension from year to year unless terminated by at least six months' notice by either party to the other; Article VI of the proposed contract shall be omitted; the rate of interest to be applied on the investment cost of all jointly used property and facilities, according to the provisions of said agreement which are not otherwise affected by the changes herein prescribed, shall be 5 per cent per annum; and, the joint accounts of the parties shall be credited currently with all revenues from rents, privileges, and concessions within zones 2 and 3.

"It is ordered, That, if within 60 days from the date hereof, The Long Island Railroad Company and The Pennsylvania Railroad Company shall jointly file with this commission written notice of the acceptance by them of the foregoing conditions, this certificate shall take effect and be in force from and after 30 days from the filing of said acceptance; and in such event the said carriers, within 30 days [fol. 9] from the date of such acceptance, shall file with this commission duly verified copies of the joint operating agreement as modified in accordance with said conditions and executed."

18. On February 26, 1932, the Transit Commission made application to the Interstate Commerce Commission for a reargument or rehearing in the case known as Finance Docket No. 7308; and on March 14, 1932, the Interstate Commerce Commission entered an order denying said application.

19. The operation for which the said certificate of February 8, 1932, was granted is the same as that now conducted and, since 1910, continuously conducted; and the facilities to be embraced in the proposed agreement are the same as those embraced in the existing agreement approved by the Transit Commission. The proposed agreement will secure to the Long Island no increased benefit or facilities. It merely modifies the terms of operation which deal with the rental, and increases the rental to be paid by the Long Island to the Pennsylvania by over $1,000,000 per annum.

20. The said certificate or order of the Interstate Commerce Commission, authorizing the issuance of a certificate of public convenience and necessary, on condition that a change be made in the terms and conditions governing the operation by the Long Island, under trackage rights, was made without jurisdiction and is illegal, unauthorized, null and void, and ought to be suspended and set aside, because:

(a) paragraph (18) of Section 1 of the Interstate Commerce Act does not apply to operation under trackage rights;

(b) the provisions of said paragraph (18) are not retroactive and do not apply to operation begun prior to 1920 and continuously conducted thereafter;

[fol. 10] (c) no statute authorizes the Interstate Commerce Commission to set aside or modify, or to permit the carriers to set aside or modify, the terms attached by a State, as a condition to the privilege of railroad corporations to contract with each other for the use of their roads or routes; and

(d) the Transit Commission has full jurisdiction and power to permit and approve such operation under trackage rights and to attach terms and conditions thereto.

21. After the Pennsylvania and the Long Island have, under color of said certificate or order, abrogated the terms

and conditions imposed by the State of New York, they can evade the terms and conditions of the agreement approved by the Interstate Commerce Commission by entering into a new agreement which will provide for the rental which both the Transit Commission and the Interstate Commerce Commission have found to be unreasonable, or, if they voluntarily submit the new agreement to the Interstate Commerce Commission, the proceeding will be one for which the Interstate Commerce Act makes no provision and in which the State of New York will be deprived of the right to be heard, which is conferred by paragraph (19) of Section 1 of said Act. The effect of the condition attached to the said certificate or order will be to enable the carriers to ignore the conditions imposed by the Transit Commission and to exercise the privilege granted by the State of New York without complying with the conditions limiting said grant and to enable the Pennsylvania to impose excessive expenses upon the intrastate traffic of the Long Island and to disregard the authority of said State and the jurisdiction of the Transit Commission, and thereby subject the State of New York and the Transit Commission to irreparable loss, damage and injury.

[fol. 11] 22. If the said certificate or order of the Interstate Commerce Commission is not enjoined, set aside and annulled and, if a restraining order or temporary injunction is not issued, the status quo will not be preserved while this Court is considering this petition on its merits, the Long Island will make the higher payments permitted by the new agreement, the State of New York and the Transit Commission will have difficulty in compelling the repayment by the Pennsylvania to the Long Island of the amounts of rental in excess of those fixed by the existing agreement, and the accounting between the Long Island and the Pennsylvania will be confused, and your petitioner and the State of New York will suffer irreparable injury, if in the final determination of this case this Court finds and decrees that the certificate or order is null and void and that the Long Island ought to continue to operate according to the terms and conditions of the existing agreement.

23. Every available means for securing a revocation of the said certificate or order of the Interstate Commerce Commission has been exhausted; and your petitioner has no

other remedy save under the injunctive process of this Court as provided by law.

Wherefore, in consideration of the premises and as your petitioner is without remedy as aforesaid and its only protection must arise from the equitable jurisdiction of this Court, your petitioner prays:

(1) That a writ of subpoena issue out of and under the seal of this Court directed to the respondent The United States of America and the respondents The Long Island Railroad Company and the Pennsylvania Railroad Company, requiring and commanding each of them on a day certain therein to be specified to be and appear before this Court and to answer this bill, but not under oath, their answer under oath being expressly waived.

[fol. 12] (2) That this Court direct that due and proper notice of this bill and proceeding issue and be served forthwith as prescribed in the said Act of Congress of October 22, 1913 (28 U. S. C. A., Secs. 41 (28) and 43 to 48, inclusive).

(3) That a court constituted as required by said Act of October 22, 1913 (28 U. S. C. A., Sec. 47), be immediately convened and that said court so constituted and convened grant a temporary stay or suspension in whole of the operation of the said certificate or order of the Interstate Commerce Commission as provided by the said section of said Act upon three days' notice restraining and suspending the enforcement, operation or execution of said certificate or order for sixty days from the date of the said order; that upon five days' notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission and to the respondents herein, petitioner herein be granted a temporary injunction suspending and restraining the enforcement, operation and execution in whole of said certificate or order under final decision upon this petition and application.

(4) That upon final hearing this Court constituted and convened as aforesaid enter a final decree herein perpetually and forever enjoining the enforcement, operation and execution in whole of said certificate or order, said decree to adjudicate, hold, order and declare that said order or

certificate of the Interstate Commerce Commission of February 8, 1932, is without warrant of law, is beyond the lawful authority of the said Commission, is null and void, and that it be suspended, set aside and forever annulled.

(5) That petitioner have and recover of the respondents its proper costs of this suit.

(6) That petitioner herein have such other, further and general relief as may be deemed by this Court fit and proper.

[fol. 13] This is the first application for an injunction in this cause.

George H. Stover, Solicitor for Petitioner, 270 Madison Avenue, New York City, N. Y.

Duly sworn to by William G. Fullen. Jurat omitted in printing.

[fol. 14] In United States District Court

[Title omitted]

Intervention of Interstate Commerce Commission—Filed April 22, 1932

To the Honorable Judges of said Court:

In accordance with the provisions of Section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, Sup. II, Title 28, Sec. 45a), we hereby enter the appearance of the Interstate Commerce Commission, as party respondent, and of ourselves as its counsel, in the above-entitled suit.

Daniel W. Knowlton, Chief Counsel. H. L. Underwood, Attorney.

[fol. 15] In United States District Court

In Equity. No. 66258

[Title omitted]

Answer of the Interstate Commerce Commission—Filed April 22, 1932

The Interstate Commerce Commission, intervening respondent herein, now and at all times hereafter saving and

reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs numbered 1 to 10, inclusive, and paragraph 12 of the petition, the Commission admits, for the purposes of this suit, that the allegations therein contained are true, except the allegation in paragraph 9 that the agreement approved July 28, 1925, is the agreement under which operation is now carried on, which allegation it denies.

[fol. 16] II

Answering paragraph 11 of the petition, the Commission says that it is without knowledge or information sufficient to form a belief as to the truth of the allegation therein contained as to amount paid by the Long Island Railroad Company to the Pennsylvania Railroad Company as and for rental for the trackage rights described for the period specified; and therefore it neither admits nor denies said allegation.

III

For answer to the allegations contained in paragraphs numbered 13 to 23, inclusive, of the said petition, the Commission admits and alleges that it made and issued the certificate of public convenience and necessity and order, dated February 8, 1932, set forth in paragraph 17 of the petition herein, in a proceeding then pending before it entitled Finance Docket No. 7308, Long Island Railroad Company Trackage; that said proceeding was initiated by the filing of a joint application of the Pennsylvania Railroad Company and the Long Island Railroad Company for a certificate of public convenience and necessity under Section 1 (18) of the Interstate Commerce Act, permitting the operation by the Long Island Railroad Company, under trackage rights, over that portion of the railroad of the Pennsylvania Tunnel & Terminal Railroad, then and now leased to the said Pennsylvania Railroad Company, between Har-

old Avenue in Sunnyside Yard, borough of Queens, and the Pennsylvania Station, borough of Manhattan, City of New York, including the use of said yard and station and the facilities and appurtenances thereof; that said application also sought an order under Section 3 (4) of the Interstate Commerce Act requiring the use of said tracks and facilities by the Long Island Railroad Company on the terms and conditions agreed upon by the said applicants; that in said proceeding several parties intervened, including the petitioner herein; that full hearings were held, and thereafter the Commission made, entered and served upon [fol. 17] all the parties in said proceeding its report and order, dated March 18, 1930, wherein and whereby it found that the present and future public convenience and necessity require the continued operation by the Long Island Railroad, under trackage rights, over the railroad of the Terminal Company as described in the record of the proceeding, but that the terms and conditions of the agreement covering such operation were not just and reasonable; that it denied that part of the application under Section 1 (18) without prejudice to the submission of a new or modified contract, and dismissed that part of the application for an order under Section 3 (4) of the Interstate Commerce Act; that thereafter, and on December 27, 1930, the Pennsylvania Railroad Company and the Long Island Railroad Company renewed their request for a certificate under Section 1 (18), presenting a new set of terms in the form of a modified agreement; that upon consideration thereof, the Commission made and issued a report on further hearing, dated February 8, 1932, and on that date issued a certificate and order certifying that the public convenience and necessity require the operation, under trackage rights, as requested, but subject to certain conditions in said certificate set forth. A copy of said original report and order and of the further report and certificate and order are attached hereto, marked Exhibits A and B, respectively. For full information as to its findings and requirements and action in the premises, the Commission respectfully refers the Court to the said reports and certificate and order.

This Commission alleges that in the said proceeding, and prior to the making, entering and serving of said reports and certificate and order, the parties thereto, including the petitioner herein, were, and each of them was, ac-

corded the full hearing provided for by the Interstate Commerce Act; that in said hearing a large volume of testimony was taken and other evidence bearing upon the matters covered in said reports and certificate and order was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of the petitioner; [fol. 18] that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including the particular questions raised by the petitioner in this suit, whereupon the Commission determined said matters and made and entered its said reports and certificate and order; that said reports and certificate and order included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by its reports, the Commission made the findings and stated the conclusions upon which the certificate and order is based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid; that in making said reports and certificate and order it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including all material matters covered by the allegations of the petition herein; that said certificate and order of February 8, 1932, was not made or issued either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said certificate and order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the petition.

Further answering paragraph 20 of the petition, the Commission denies that in authorizing and issuing the certificate of public convenience and necessity and order, it acted without authority or in excess of its authority, and further denies that its certificate and order is null and void for the reasons set forth in said paragraph 20 or for any other

reason. On the contrary, the Commission avers that under [fol. 19] and by the provisions of the Interstate Commerce Act it is vested with power and authority in matters of the kind complained of by petitioner; that the power and authority of the Commission with respect to such matters is plenary and exclusive and is paramount to state authority in the matter of its exercise and in the results attending action in pursuance of the rights or privileges conferred in the exercise of that power and authority. The Commission further specifically denies the allegation contained in subparagraph (d) of said paragraph 20, that the petitioner, the Transit Commission, has jurisdiction and power to permit and approve operation under trackage rights such as that which is the subject of the petition, and to attach terms and conditions thereto.

Answering specifically paragraph 18 of the petition, the Commission admits the filing by petitioner of an application for rehearing or reargument in the proceeding Finance Docket No. 7308, and that the Commission denied said application.

Further answering paragraphs 21 and 22 of the petition, the Commission denies that either the effect of its certificate and order, or the enforcement thereof, or action under the authority thereof, will be to subject either the petitioner of the State of New York to either irreparable loss, or damage, or injury for the reasons set forth in those paragraphs or for any other reason.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order of March 18, 1930, and the further report and certificate and order of February 8, 1932, which reports and certificate and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall [fol. 20] direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by H. L. Underwood, Attorney. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fol. 21] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

[fol. 22] EXHIBIT "A" TO ANSWER OF I. C. C.

[fol. 23] INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

LONG ISLAND RAILROAD COMPANY TRACKAGE

Submitted January 28, 1930. Decided March 18, 1930

1. Present and future public convenience and necessity found to require the continued operation by the Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue, in Sunnyside yard, and the Pennsylvania Station, New York, N. Y., including the partial use of said yard, station, and appurtenant facilities, but the proposed terms covering such operation not found to be just and reasonable. That part of the application under section 1 (18) of the act denied without prejudice.

2. That part of the application for an order under section 3 (4) of the act dismissed.

Alfred A. Gardner, D. P. Williams, and Joseph F. Keany for applicants.

Arthur J. W. Hilly, Vincent Victory, M. Maldwin Fertig, and Harry Hertzoff for city of New York; George H. Stover and Edward M. Deegan for Transit Commission of State of New York, and Maurice Hotchner for Association of Long Island Commuters, Incorporated, interveners.

Report of the Commission

Division 4, Commissioners Meyer, Aitchison, and Woodlock

By DIVISION 4:

Exceptions to the report proposed by the examiner were filed and the case was argued orally.

On December 13, 1928, the Pennsylvania Railroad Company, lessee of the Pennsylvania Tunnel & Terminal Railroad, and the Long Island Railroad Company, carriers by

railroad subject to the interstate commerce act, filed a joint application under section 1 (18) of the act for a certificate that the present and future public convenience and necessity require the operation by the latter, under trackage rights, over that portion of the lessor company's railroad between Harold Avenue, in Sunnyside yard, borough of Queens, and the Pennsylvania Station, borough of Manhattan, New York, N. Y., a distance of 4.2 miles, including the use of said yard and station, and the facilities and appurtenances thereof, and for an order under section 3 (4) of the act requiring the use of said tracks and facilities by the Long Island Railroad Company on the terms and for the compensation agreed upon by the Pennsylvania Railroad Company and the Long Island Railroad Com-[fol. 24] pany. On May 21, 1929, an amended application was filed, in which the amounts of investment for the several major divisions of the jointly used facilities were revised. A proposed joint agreement dated November 13, 1928, effective July 1, 1928, was appended. The interveners all oppose the granting of the application. A hearing was held and briefs were filed.

For convenience, reference will be made in this report to the Pennsylvania Railroad Company as the Pennsylvania, to the Pennsylvania Tunnel & Terminal Railroad Company as the Terminal Company, to the Long Island Railroad Company as the Long Island, to the city of New York as the city, to the State of New York as the State, to the Transit Commission of the State of New York as the Transit Commission, to the Association of Long Island Commuters, Incorporated, as the commuters, to the Lehigh Valley Railroad Company as the Lehigh Valley, and to the New York, New Haven & Hartford Railroad Company as the New Haven.

All the capital stock of the Terminal Company, and practically all the capital stock of the Long Island, are owned by the Pennsylvania, which operates the property of the former under a long-term lease pursuant to authority granted by us on August 4, 1928, 145 I. C. C. 283, but does not operate the property of the latter. Broadly considered, all the lines and facilities involved in this application are those of the Pennsylvania. But the rental to be charged to the Long Island is not an intercompany affair when the public may be materially affected as a result of

the amount paid, and it is this consideration which forms the basis of the interveners' protest. According to the contention stoutly advanced, the increase which is now proposed over the present rental will, by reason of its effect on the earnings of the Long Island, be used as a basis for an attempt to raise the commutation fares on that road by application to the Transit Commission. The interveners claim that the terms of the agreement presented with the application would impose an unfair burden upon the Long Island, and they further represent that the commission is without jurisdiction in the premises but that the Transit Commission has in the past exercised its authority as granted by the State and should continue to do so.

It is true that the joint agreement under which the Long Island has been using these facilities since July 1, 1923, is one which was framed to meet the requirements of the Transit Commission, as expressed and made retroactive by their approval of the contract of July 28, 1925, after extended hearings and investigation. Prior agreements were also approved by the Transit Commission or its predecessor. It is true that the amount of rental which the Long Island pays to its parent company is a matter that primarily concerns intrastate passenger traffic, indeed hardly [fol. 25] more than traffic within the suburban zone of the city, and that the public interest affected might appear to be entirely local. These facts do not, however, place the granting of authority covering these trackage rights beyond the purview of section 1 (18). The existing agreement of the Pennsylvania and the Long Island was on a yearly basis. It technically expired on December 31, 1925, and was extended for one year. The desire now being to establish a more permanent arrangement, the proposed agreement is for a term of 20 years beginning July 1, 1928. The granting of authority for the applicants' proposal under section 1 (18) is both necessary and appropriate, and there is no sound reason preventing the assumption of jurisdiction by us under this part of the act, even though joint operation began prior to the effective date of the transportation act, 1920, and has been continuous. As to section 3 (4), which provides for the compulsory opening of one carrier's terminal facilities to another carrier when

the public interest requires such use, there is nothing in the situation here presented which brings it within the terms of that paragraph. By voluntary arrangements between the parties the Long Island has been using the tunnel, yard, and terminal facilities provided for it by the Pennsylvania in New York since September 8, 1910. There is no suggestion that the Pennsylvania intends to discontinue this privilege. The question of compensation is indeed at issue, but, contrary to the applicants' understanding of the force of this fact, associated as it is with the close corporate relationship between the companies, the applicability of section 3 (4) does not appear. Accordingly, the fixing of compensation as therein provided on the principle controlling compensation in condemnation proceedings, may be disregarded. That part of the application which is under section 3 (4) will therefore be dismissed. The reasonableness of a joint-facility rental is in general a matter of public interest, as well as a matter which may affect the operations of the carriers in interstate commerce, and should be considered by us in reaching a finding of public convenience and necessity. Thus, the financial as well as the transportation features of the present application may be fully recognized and dealt with under the authority conferred by section 1 (18). In cases of extensions of operations under trackage rights the cost of the applicant companies is not less important than in cases of extension by construction, acquisition, or lease. A motion to dismiss the application on the ground of lack of jurisdiction was properly denied.

The contentions of counsel for the Transit Commission are in substance that, assuming we have any jurisdiction, our certificate should be based primarily on the showing of [fol. 26] public convenience and necessity, and that the only requirement pertaining to rental terms which we should recognize is that the operation will not weaken the user. It is claimed that both carriers here have prospered under the existing agreement. It is also claimed that we have no power to prevent the parties changing the terms of an agreement covered by our certificate after such certificate shall have been issued. Counsel ask that we issue an unconditional certificate, leaving the question of rental to the judgment of the Transit Commission, which, under the power conferred upon it by section 148 of the railroad

law of the State, may withhold permission for the Long Island's operation until a compensation which it considers reasonable be agreed upon, and submitted along with the application for authority to operate. Counsel for the city argue that section 1 (18) of the act, if applicable, does not require us to determine compensation, and that, in view of the fact that the Long Island's traffic at the terminal is intrastate, we should not exercise jurisdiction in this case.

The power conferred upon us by the act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary. The case is brought to issue mainly because of the possibility of increased fares on the Long Island, but consideration of the questions of rental, degree of use, and the like which are now presented must be weighed entirely on the showing of fairness and reasonableness and should not be influenced by the contingency emphasized by the protestants. The Pennsylvania and the Long Island are entitled to equally fair treatment in the matter. The terms of past agreements are not before us for approval.

The Pennsylvania completed in 1910 its extensive project of establishing a passenger terminal in New York. As shown by the record, provision was made for the accommodation of the Long Island's passenger traffic into and out of the city by constructing two single-track tunnels under the East River, tracks and platforms in the terminal, and other facilities for the Long Island's use. That carrier's operation into the terminal has been continuous for 19 years, during which period the number of passengers handled annually has more than trebled and the earnings of the company have risen from a deficit of $510,221 in 1920 to a net income of $4,682,656 in 1928. Instead of the former ferry connection on the East River between Long Island City, in the borough of Queens, and the foot of Thirty-fourth Street, in the borough of Manhattan, the Long Island has enjoyed the great advantage of a direct rail connection with Pennsylvania trains, city subways, etc., at the Pennsylvania terminal. The service to the public [fol. 27] and the benefit to the carriers by the operating arrangement between these companies are well established and are entirely uncontroverted. The need for continued

operation by the Long Island in this manner may be safely assumed to have been demonstrated.

The Terminal Company's property represents that of two predecessor companies, the Pennsylvania, New York & New Jersey Railroad Company and the Pennsylvania, New York & Long Island Railroad Company, whose ownership embraced, respectively, the new facilities in the States of New Jersey and New York. There were constructed two single-track tunnels under the Hudson River, a yard and passenger station in the borough of Manhattan, four single-track tunnels extending easterly beneath the city and the East River, and the Sunnyside yard, in the borough of Queens, on Long Island. Provision was made for electric operation. The total expenditure approximated $115,000,000, which was covered in part by $25,000,000 of Terminal Company stock and a certificate of indebtedness of $84,861,000 issued to the Pennsylvania. The certificate was placed on the Pennsylvania's books at $57,461,000; the Terminal Company's stock was "marked down," and the total amount finally written off was about $59,000,000. The average cost of money during the construction period 1905-1910 was about 5 per cent.

Besides the Pennsylvania and the Long Island, the terminals and tunnels are used by the Lehigh Valley and New Haven. In the studies of traffic, etc., the cars of these lines have been combined with those of the Pennsylvania, and they may be considered as having no material bearing in a determination of the questions involved except where specifically mentioned. The fundamentals of the case consist of defining the physical limits of property jointly used and property exclusively used by the Long Island and the Pennsylvania, together with the respective values thereof and the annual rate of interest to be applied thereon, and of fixing a suitable measure of the relative use of the facilities within each physical division of the property.

Omitting the Terminal Company's line which is used solely by the Pennsylvania, namely the portion situated west of Tenth Avenue, borough of Manhattan, the facilities affected by the Long Island's operation are described as follows:

Zone 1.—Bounded approximately by Sixth Avenue, Thirty-first Street, Tenth Avenue, and Thirty-third Street. Contains a track layout at a level about 47 feet below the

street, with 21 tracks at platforms, the area being enclosed by retaining walls. The station building occupies the block between Seventh Avenue, Thirty-first Street, Eighth Avenue, and Thirty-third Street. The Long Island waiting room, concourse, etc., are located on the level immediately [fol. 28] above the tracks. Above this are five other floor levels, arranged as Pennsylvania facilities. Long Island trains do not proceed west of Tenth Avenue. Investment stated for zone 1, as of July 1, 1928, is $46,896,746.94.

Zone 2.—Embraces four single-track tunnels extending easterly from zone 1 under East River, together with tracks running to Harold Avenue, borough of Queens, where connection is made with the Long Island's lines. Two of the tunnels are exclusively used, and two partly used, by the Long Island. Investment stated for zone 2, as of July 1, 1928, is $32,605,521.38.

Zone 3.—Embraces Sunnyside yard and adjacent facilities near Harold Avenue. These facilities are primarily for the storage and handling of Pennsylvania cars. Several tracks are used, however, by the Long Island for storing such trains as are hauled by electric locomotives into the station in zone 1. Investment stated for zone 3, as of July 1, 1928, is $8,623,170.90.

If the foregoing amounts of investment be added to the cost of the Pennsylvania tunnels west of Tenth Avenue, as shown by an exhibit of record, the grand total is $106,744,446. The final value of the Terminal Company's owned property as of June 30, 1918, found by us for rate-making purposes but not introduced as evidence in this proceeding, is $120,885,852. The basic amounts set up by the applicants in the proposed agreement were not contested per se, the main point raised in this connection being whether or not the station building should be excluded because not being required for the Long Island's use. The basic amounts represent original cost.

For the electric power plant in Long Island City and the distribution system, no amount is included in the foregoing investment for the three zones. It is provided in the proposed contract that a value be agreed upon for these facilities by the parties. In the 1925 agreement a value of $9,189,677 was used. As the central plant furnishes power for the operation of Long Island trains outside of the terminal

area, as well as for trains of the Hudson & Manhattan Railroad between Newark and Jersey City, N. J., a comparatively small part of its output is used by trains of the Pennsylvania and Long Island moving over the Terminal Company's tracks. This is the reason given for the omission of a specific sum in the agreement. It is not clear why the applicants can not arrive at an understanding as to value at this time.

Since September 1, 1910, five successive operating agreements between the carriers have been in force. In each instance there was voluntary submission to the State commission, as required by State law. Under the terms of all these contracts, operating expenses were apportioned between the Pennsylvania and the Long Island on a wheelage [fol. 29] basis, which is the ratio of the car movements of each carrier to the total car movements, in each zone. Except in the first agre-ment, taxes were divided on that basis. The Long Island paid fixed rentals or interest on the investment in amounts varying from $156,000 to $300,000 per annum. In June, 1923, the carriers applied to the Transit Commission for approval of a new contract under the terms of which the Long Island would have paid a total of $2,665,165 for rental, operating expenses, taxes, and use of power in 1922, as compared with a total of $1,660,165 actually paid under the existing agreement. Concurrently the Long Island applied for authority to increase fares on its suburban lines within the city. An investment of $83,306,-191 was set up in the new agreement for the property in zones 1, 2, and 3, and the Long Island was to pay annually a sum corresponding to such portion of 4 per cent on this investment as the number of its car movements bore to the total number of car movements. Under this principle there would have been an increase of about $1,000,000 in the rental payment alone. This was considered unfair to the Long Island because of the alleged relatively small need of that carrier for the elaborate terminal erected by the Pennsylvania. Exception was taken to the distribution of operating expenses on a wheelage basis, notably with respect to the large item of station employees. The agreement provided for interest on the power plant and distribution system on the basis of 4.5 per cent, which was the same rate as applied in the earlier contracts. In this case, known as No. 2692, and hereinafter so called, the Transit Commission held hearings during approximately two

months, and then entered an order denying the application and disapproving the agreement.

In March, 1925, the carriers submitted to the Transit Commission the modified agreement under which operation is now carried on. After hearing in a case known as No. 2754, the Transit Commission approved this agreement and permitted it to become retroactive to July 1, 1923. In order to meet the Transit Commission's previous objection, the applicants eliminated from the investment in zone 1 the sum of $15,000,000 as representing the station building above track level, and from operating expenses the corresponding expenses and taxes. The interest rate, however, was proposed to be raised from 4 to 5 per cent. In net effect there would have been a reduction of about $353,000 from the annual payment of the Long Island as compared with the plan which had been disapproved in case No. 2692. In the deciding opinion in the proceeding it was concluded that the wheelage basis of apportionment was probably the most practical and common-sense method that could be used. It was decided that no change in the $15,000,000 ad- [fol. 30] justment was required because of such costs as real estate and excavation in zone 1, which the interveners contend should not all be left in the investment that is used in the proposed contract. The opinion held that the charging off by the Pennsylvania of about one-half the investment in the terminal property did not affect the merits of the rental question. The proposed change in interest rate to 5 per cent was disapproved and the parties required to maintain the same rates that were incorporated in the contract last submitted to the Transit Commission, viz, 4 per cent on the adjusted investment in zones 1, 2, and 3, and 4.5 per cent on the electric distribution and power system. The more important provisions of the approved agreement of July 28, 1925, follow: The wheelage ratio, in which one locomotive is counted as three cars, is applied to the interest at 4 per cent on a total value of $70,392,230 for the jointly used facilities in zones 1, 2, and 3, from which the station facilities above track level are excluded. The wheelage ratio is also applied to all operating expenses, maintenance, and taxes at track level. Interest is accrued on the cost of future additions and betterments to the property at 6 per cent. On the agreed value of $9,189,677 for the electric power and distribution system as of December 31, 1924, interest at 4.5 per cent is applied. The sum decided

upon for the station building was composed principally of $14,092,499 for the structure proper, and $860,000 for one-half of a service plant on Thirty-first Street which is used to supply light, heat, and power to the station.

The plans of the carriers in all these cases were actively opposed by the city, the commuters, and others. After joint hearing before the Transit Commission and the Public Service Commission of the State of New York, the Long Island's application for authority to increase its suburban fares was denied. As has been stated, the Transit Commission joins with the city and the commuters in opposition to the granting of the application pending before us.

A statement of the total costs attached to the facilities under discussion, including the station, before any allocation between the carriers is made, for the year 1928 is given below:

	Zone 1	Zone 2	Zone 3	Total
Valuation	$46,896,747	$32,605,521	$8,623,171	$88,125,439
Interest at 6 per cent	2,813,805	1,956,331	517,390	5,287,526
Taxes	903,101	494,218	94,011	1,491,330
Operating expenses	2,735,386	243,804	513,052	3,492,242
Total	6,452,292	2,694,353	1,124,453	10,271,098
Credit from concessions	1,040,929	21,964	63,393	1,126,286
Net total	5,411,363	2,672,389	1,061,060	9,144,812

[fol. 31] With the use varying according to the wheelage ratio in each zone, the Long Island paid to the Pennsylvania the following total amounts in 1928, under the terms of the existing contract:

Operating expenses	$459,902
Interest on investment	1,361,842
Taxes	550,398
Total	2,372,142
Cost of electric power and interest on power facilities	324,416
Direct operating charges	138,623
Grand total	2,835,181

As compared with the sum of $2,372,142, covering facilities other than electric power, the Long Island would pay under the agreement now proposed:

Interest at 6 per cent	$2,400,921
Taxes	681,384
Operating expenses	1,339,194
Total	4,421,499
Proportion of credit from station concessions	451,880
Net total	3,969,619

Under the proposed arrangement, the station building is reinstated in the investment. The items of operating and maintenance expenses previously withdrawn as pertaining to the station above track level also have been included. The interest rate has been increased from 4 per cent to 6 per cent on present value, or investment. Allowance is made for the first time for rentals received by the Pennsylvania from offices, stores, and other concessions in the station. As under the existing contract, the aggregate of interest, taxes, and operating expenses in each zone is to be the base to which the wheelage measure in that zone is applied. For 1928, the wheelage ratios for the Long Island were as follows: Zone 1, 41.44 per cent; zone 2, 59.94 per cent; zone 3, 11.60 per cent. It was stated that there would be an increase of approximately $20,000 in the annual charge for power, which is apparently due to the change in interest on the investment from 4.5 per cent to 6 per cent. There would be no change in the direct operating charges. The agreement contains provision for revision at the end of 5-year periods with respect to the rates of interest and the bases upon which they are computed.

It is made plain that no increased benefits are to be enjoyed by Long Island passengers by reason of the proposed contract, as the facilities used by them will be the same as at present. The applicants contend, however, that the proposed agreement is fair and equitable, that the wheelage [fol. 32] method of apportionment is the fairest and most practical method of determining compensation for use of a joint facility, that the station building should be included since it is largely and increasingly used by Long Island passengers, and that the tracks and platforms in zone 1, taken as a whole, are used to practically the same extent by both roads.

Reflecting the growth of passenger business on the Long Island and the lack of such growth on the Pennsylvania, attention is called to the fact that nearly 50,000,000 Long Island passengers passed through the terminal in 1928, while the Pennsylvania had only 10,000,000. An engineer testifying for the applicants claimed that the value of the use to the Long Island can not practically be determined, but that the plan attempts to measure the relative use actually made of the facilities. In defense of the 6 per cent interest rate, it is argued that that rate is practically the legal one in New York and Pennsylvania and is the rate

prescribed in the transportation act for loans from the fund created by recapture.

To all the main features of the proposed agreement and to the applicants' contentions in support of them, the interveners emphatically object, particularly as regards zone 1. The position of the city and the commuters was developed in great detail in the Transit Commission hearings hereinbefore mentioned, and it is evidently intended that we should recognize the facts and considerations which were matters of evidence in the Transit Commission cases. To the extent that such evidence is included in the present record this may be done. In the statement of facts following it will be understood that the Pennsylvania's operation includes equipment of the Lehigh Valley and the New Haven.

The multiple-unit electric trains of the Long Island move over main lines and at least 10 different branches on Long Island to the Flatbush Avenue Terminal in the borough of Brooklyn and the Pennsylvania Terminal in the borough of Manhattan. Because of the numerous suburban routes, scheduled service rather than headway service is required. In connection with the Pennsylvania Terminal, tunnels 3 and 4 in zone 2 are assigned to the Long Island, and tunnels 1 and 2 to the Pennsylvania, but in the hours of heavy traffic it is necessary for the Long Island to use all the tunnels. At the Manhattan terminal about 75 per cent of the Long Island trains are stored during the day in yards B and C, and to some extent in yards A, D, and E, all these yards being located at the west end of the track area. Certain trains, however, are sent back from the platforms at which they arrive, and a few others, which are hauled by electric locomotives, are taken to Sunnyside yard for storage, cleaning, etc. In the terminal plan the Long Island [fol. 33] was originally assigned four platform tracks, viz, Nos. 18, 19, 20, and 21, and partial use of three others, viz, Nos. 15, 16, and 17. According to the applicants' witnesses, the Long Island now uses four tracks exclusively and 11 tracks jointly with the Pennsylvania. On joint tracks Nos. 5, 6, 8, and 9, some 16 Long Island trains carrying 13,000 passengers are brought in during the morning rush hour. In addition to its regular traffic, the Long Island also runs from 4 to 10 trains daily in the racing season between May and October, using tracks Nos. 15 and 16. Passengers for these trains depart from the Pennsylvania concourse on

the level next above the Long Island concourse and do not use the Long Island waiting room. The Pennsylvania has practically no suburban business at this station, such traffic being handled at the downtown terminal of the Hudson & Manhattan Railroad. At the maximum the Long Island brings in 36 trains per hour, unloads a train in four minutes, and starts a train out from each platform every 10 or 12 minutes. Pennsylvania trains generally remain 20 minutes at the platforms, except in the case of Pullman sleeping cars which are brought into the terminal at about 10 p. m. and stand ready for occupancy until they depart between 11 p. m. and 2 a. m. If the total traffic in the whole period of 24 hours be considered, the Long Island has an average of 76 trains per track on five tracks for an average time of 14 minutes each, and 11 trains on nine tracks for an average time of 21 minutes each. As compared with this the Pennsylvania has 13 trains per track on seven tracks and 16 trains on nine tracks for an average time of 61 minutes each. The Long Island has an extremely heavy peak traffic which far exceeds the density on the Pennsylvania. In the rush period the Long Island hourly sends 25 trains through its tunnel and 11 trains through the Pennsylvania tunnel in zone 2. The Pennsylvania has operated 15 trains per hour but the usual number is about five. It is clear that the principal operation of the Long Island in the terminal is of a different character from that of the Pennsylvania.

A count made during a 24-hour period in March, 1929, shows the relative use of station tracks in zone 1 to be as follows:

	Long Island	Pennsylvania
Number of trains, eastbound	243	120
Number of trains, westbound	238	113
Number of trains, total	481	233
Number of cars eastbound and westbound, counting one locomotive as three cars	3,860	2,772
Switching movements	193	540
Total time occupied	126 hrs., 22 mins.	236 hrs., 13 mins.

[fol. 34] For the year 1928 the total number of car movements in the three zones were as shown below:

	Long Island		Pennsylvania	
	Number	Per cent	Number	Per cent
Zone 1	1,370,677	41.44	1,936,754	58.56
Zone 2	1,370,677	59.94	915,947	40.06
Zone 3	110,874	11.60	844,715	88.40

It is pointed out that, in general, the Pennsylvania trains make four movements at the terminal by reason of storing cars at the Sunnyside yard in zone 3, while the Long Island trains make but two movements, their cars being stored in the terminal, zone 1. Later in this report the method of counting cars will be discussed.

Another 24-hour count shows the average number of cars stored in the yards at the station as follows:

	Long Island cars	Pennsylvania cars
Yard B	17.8	0
Yard C	39.8	0
Yards A, D, and E	26.3	37.1

The applicants compiled and introduced a statement of the length of tracks and platforms occupied by the trains of each carrier at the station, and the respective time of their occupation, from which it was deduced that the total track area of 1,214,449 square feet should be apportioned in the ratio of 49.34 per cent to the Long Island and 50.66 per cent to the Pennsylvania. It was shown that 48,540,920 Long Island passengers arrived at and departed from the terminal in 1928, as compared with 10,597,115 Pennsylvania passengers. The time is thought to be approaching when a greater number of persons can not be handled by the Long Island at this station, and there is under consideration a new and additional terminal at Diagonal Street in Long Island City. It is believed that the limit of capacity has been reached at one hour of the morning and one hour of the evening, and that the only way in which more passengers could be carried would be by adding two cars to each train of 10 cars.

In connection with the evidence pertaining to the track facilities in zone 1 and their use, it may be stated that the commuters introduced testimony by an expert witness, and contend in their brief, that the Long Island requires but six station tracks and therefore that it should be charged with only six twenty-firsts of the investment and expenses [fol. 35] at track level. This intervener considers that the Long Island uses virtually five tracks exclusively and nine other tracks jointly, and that the aggregate number of trains on the latter is such that one additional exclusive track would be sufficient to meet the road's needs had the

general layout been designed with due regard to the Long Island's operation. It is further claimed that the Long Island's use of the joint tracks does not interfere with the comparatively small requirements which the Pennsylvania has for them. Concerning these suggestions the applicants' engineer explained that no rigid division of track space would be desirable since efficient operation requires that the tracks be used according to the varying demands of the two carriers at different times during the day and night. As having some bearing on the division of space, a study presented by the city in case No. 2692 indicated that the trackage originally assigned to the Long Island at the station corresponded to 12.72 per cent of the total volume of space at that level.

With respect to the station facilities above track level, the existing contract represents the insistence of the Transit Commission on the deletion of their cost from the investment because of the consideration that this large station is not needed for commutation traffic. It also represents the Transit Commission's desire to have the old 4 per cent interest rate retained. These concessions by the carriers were generally looked upon as mitigating the alleged injustice of the wheelage ratio. Under such circumstances it is not surprising that a proposal to include the entire investment and to raise the interest rate, while retaining the wheelage provision as before should bring forth a strong protest. As already stated, all ticket offices, waiting rooms, and other station facilities assigned to the Long Island are located on the exit-concourse level immediately above the tracks and reached therefrom by stairways. The westerly part of the general concourse space on this level is used by incoming passengers of the Pennsylvania. The three areas on this level devoted to the Long Island for various purposes were estimated respectively at 100 by 100 feet, 150 by 200 feet, and 50 by 150 feet. As the floor areas in the entire building were not calculated by the witness who testified as to these figures, they can not be consistently utilized in computing an apportionment of the total station space. In case No. 2692 the city introduced a computation which purported to show that the Long Island occupied only 1.559 per cent of the total cubic feet in the structure. The Long Island waiting room has been reduced in size and the concourse enlarged, but this is not understood to

affect the aggregate area occupied, which is said to be larger than that originally assigned. The Long Island's waiting-room facilities are smaller and less elaborate than those on the station levels above them, but the applicants [fol. 36] contend that the commuters, constituting from 70 to 75 per cent of all Long Island passengers, require only the relatively small waiting-room space that has been provided. However, it seems that those persons who are obliged to wait a considerable length of time make use of the Pennsylvania's main waiting room because of the crowded conditions below. Passengers going to the race trains do not occupy the Long Island waiting room at all, and it was testified that the Long Island passengers in general use the Pennsylvania part of the building extensively. With the approaching opening of a new subway on Eighth Avenue and the connection of its station with the Pennsylvania Terminal, Long Island passengers will make a still greater use of the building in passing between their trains and that subway station. As to the spaciousness and elaborateness of the terminal, the applicants argue that these features are and have been as much an advertisement for the Long Island as for the Pennsylvania, and that the increase in business and earnings of the former carrier is largely due to these circumstances. While the Long Island has no rail competition in its territory, it competes with roads which serve other suburban residential districts and thus may be fairly considered to derive a general benefit from the attractiveness of its city terminal. From a purely utilitarian point of view it may be conceded that the frequent suburban service of the Long Island, almost but not entirely equivalent to the headway operation performed by the Hudson & Manhattan, does not need a monumental type of terminal building. At the same time, the fact is that a steady and substantial increase has taken place in the Long Island's traffic without much change in that of the Pennsylvania. If between 70 and 75 per cent of the Long Island's passengers are regular commuters, the others somewhat outnumber the total of all Pennsylvania passengers which use the station. Built primarily for the Pennsylvania, with some 12,000 miles of line within its system, the terminal seems to have become far more of a facility for the Long Island, with 400 miles of line, than was originally contemplated.

The commuters stress the fact that the $15,000,000 value placed upon the station above track level reflects nothing for the cost of excavation, land, and other items, and they say that the amount should probably have been over $25,000,000. In a statement showing a separation of the costs in zones 1, 2, and 3, as of December 31, 1923, the charges under buildings include $14,092,499.11 to "Station—Manhattan," and $1,713,041.67 to "Service Plant—Manhattan." The same statement shows for zone 1 real estate, $11,484,551.16, easements, $1,800,796.25, taxes, $1,429,316.37, and grading, $7,201,008.24. No separate item for retaining walls is found, and, according to the testimony for the applicants, no part of that cost was included in the $15,000,000, but is [fol. 37] included, together with all the land, excavation, etc., under the existing agreement in the investment for zone 1 upon which the Long Island pays its proportion of interest. The theory by which this is done must assume that the costs described would have been incurred in any case by the construction of the track layout itself. The station structure occupies approximately one-fourth of the total length, east and west, of zone 1. Evidently the Transit Commission did not withhold its approval of the $15,000,000 adjustment, because no part of these other costs were incorporated therein.

In case No. 2692, the commuters made a showing of the Long Island's terminal costs in zone 1 as compared with the terminal costs of the Hudson & Manhattan in New York, and the city presented an engineering report in which a hypothetical terminal at Thirty-third Street and Fourth Avenue, Manhattan, together with two tunnels extending to Long Island, were projected and estimated. The cost of the station building in the latter study was shown as $3,549,000, and that of the whole project as $20,296,275. These showings have something more than an academic interest, yet it is existing conditions which must be dealt with, even though those conditions are not all definitely determinable. In the opinion in case No. 2692, it was said that "it is very difficult, if not impossible, to determine upon any basis of mathematics, what percentage of the cost of these terminal facilities should be charged as a monument to the renown of the Pennsylvania Railroad."

As the interest on value, operating expenses, and taxes are all to be apportioned under the proposed agreement

on the wheelage or car-movement basis, this provision is an important consideration. No change has been made or is intended to be made in the method of counting cars which has been followed since 1910. A separate count is made in each zone, and the applicants claim that the result is very much in favor of the Long Island. The cars of multiple-unit trains do not have to be switched to the same extent that those of steam trains do, nor is the same amount of cleaning and reconditioning required. There are consequently not so many movements of empty cars by the Long Island as by the Pennsylvania. Since revenue trains of the Long Island do not pass through Sunnyside yard, it will be sufficient to describe the operation in zones 1 and 2. The cars of each road are counted once as they enter zone 1, once as they leave it, and once as they pass through zone 2. A Long Island train coming in westbound, stopping or laying over at the station, and returning eastbound is counted a total of four times in these two zones. A Pennsylvania train coming in eastbound, stopping at the station, passing through the tunnel in zone 2 toward Sunnyside yard for storage, and later repeating the movement westbound, [fol. 38] is counted a total of six times, which includes the nonrevenue movements in zone 2. In but five cases in 100, where a Pennsylvania train returns to the west from the station without going to Sunnyside yard are Pennsylvania cars counted only twice. A slight inequity to the Long Island may be found in the fact that not all of the Long Island cars traverse the entire length of zone 1. To the objection that Pennsylvania cars are of greater weight than Long Island cars, it is stated that the latter are accelerated faster, requiring a greater proportion of power in a short run, that the steam used for heating the Pennsylvania cars is charged directly to that company, and that an average Long Island car brings in two or three times as many passengers as a Pennsylvania car. For these and other reasons it is not considered necessary to apply a factor of adjustment to the number of Pennsylvania units in order to allow for their greater weight, capacity, and length. Some of the objections to the wheelage theory are based on the difference in kind of operation. The commuters assert in connection with the tunnels in zone 2 that instead of all four being treated on the wheelage basis the Long Island should be charged with the costs of the two which it uses exclusively

and with the wheelage proportion of the other two, which are primarily for the Pennsylvania's use. This intervener also argues that the nonvariable costs of the terminal can not be consistently included in charges to which the wheelage factor is applied. Much was said about the density of operation of the Long Island, tending, as compared with that of the Pennsylvania, to low unit costs, and it was claimed by the interveners that the wheelage apportionment would transfer this benefit to the Pennsylvania. With the increasing traffic of the Long Island, this will operate progressively to the Long Island's disadvantage. Here again the idea of costly facilities, not needed for rapid-transit purposes, is involved. As seen by the interveners, the Long Island is given limited facilities and these are used with great intensity. The layout, especially the building, was made to suit the Pennsylvania, and the investment was determined by its needs. It is claimed that few of the operating expenses in zone 1 depend on the number of cars operated, and that a large proportion of them is directly connected with operating the station. Attention was called to the station expenses in 1923, those for a more recent year not being supplied by the applicant. Of total expenses of $2,140,629 in the station zone, $1,247,221.38 was for station employees alone. Of $368,820.09 spent for maintenance, $158,584.45 was for the station. Of 573 station employees in July, 1924, 459 were assigned to the Pennsylvania. The significance of these figures, when it is proposed to apply the wheelage factor to the operating costs of the entire terminal, is apparent. The commuters' expert witness con- [fol. 39] ceded that the present exclusion of the station costs limits materially the impropriety of applying the wheelage basis. But even for the facilities at track level he does not fully accept that method, suggesting that the commutation service of the Long Island requires a treatment based on the number of tracks actually needed if the layout were properly designed, with come consideration to the length of time occupied. His position in short is that the wheelage basis is not predicated upon the facilities needed or used by the Long Island. In the case of the Grand Central Station in New York, the use and requirements of the two operating carriers, he thinks, are practically identical and

therefore that no better method than the wheelage basis can be found.

There is, as has been shown, a material difference between the dense suburban traffic of the Long Island, which makes for low unit-operating expense, and the trunk-line traffic of the Pennsylvania, with heavy and comparatively infrequent trains and no suburban service. To allow for this with any degree of precision is, however, extremely difficult. It has been noted that one alternative to the wheelage method would be a flat division of the track-level facility expense in the ratio of six twenty-firsts to the Long Island and fifteen twenty-firsts to the Pennsylvania. In its brief the city recommends that the Long Island pay the Pennsylvania "a fair and just proportion" of the maintenance and operation expenses at the track level. Agreement among all the parties as to what would be a fair and just proportion is probably beyond hope of realization. In the opinion in case No. 2754, it was considered a significant fact that other tenant companies using the terminal had accepted the wheelage principle, and, after a careful review of the large mass of evidence which had been introduced, the conclusion was reached that the claimed benefits and detriments under that plan about offset each other. As to the effect of a continued increase in the Long Island's traffic, the interveners expressed concern over the mounting charges to be borne by that carrier. On this point the Transit Commission's opinion to the effect that greater use should in common fairness call for higher rental, seems to be an adequate answer. Upon the whole, the wheelage measure of use as now computed can not well be discarded, but the manner of its application can be made to conform more closely with what are believed to be sound principles governing the joint use of facilities of the kinds here found.

With respect to the use of electric power furnished by the Pennsylvania to contact shoes on the Long Island's equipment, little objection was raised to the wheelage ratio. The applicant explained that the only method of direct and actual measurement of power would be by means of meters [fol. 40] on each car, a very expensive alternative. As has been explained, the investment in power and distribution facilities properly assignable to the Long Island has not been determined and is to be fixed by agreement. The rate of interest proposed to be applied is, as with the other

facilities, 6 per cent, while the rate used in the existing agreement for the power system is 4.5 per cent.

Other than the facts already stated, the applicants do not offer much evidence in support of the proposed change of interest rate to be applied on the investment. It is suggested by them that something should be conceded to the fact that original cost of the property has been set up rather than value based on present prices, which, it is claimed, would be twice as great, and further, that no interest during construction was charged prior to 1920. Since the Pennsylvania did not finance its terminal construction through security issues specifically applicable thereto, the actual carrying charges are not known. A witness testifying as vice president and comptroller of both applicants stated that the cost of money to the Pennsylvania during the construction period between 1905 and 1910 was about 5 per cent. That appears to be the dividend rate on the Terminal Company's capital stock. On the Terminal Company's note of $58,600,576.95, 4.5 per cent is charged. Testimony showing that the Pennsylvania has increased the annual rate of dividends on its stock from 6 to 8 per cent, as well as issued a large amount of new stock, and that an average rate of 6.5 per cent is now paid on outstanding securities, would not seem to be material. It is stated in the opinion in case No. 2754 that 6 per cent has been used in the Pennsylvania's contracts with the Lehigh Valley and the New Haven. But with the controlled Long Island, the situation is somewhat different, at least as seen by the interveners in this proceeding, especially as they claim that the Pennsylvania's action in charging off approximately one-half of the cost of the project indicated that it was to be treated as an unproductive investment. The city recommends a 4 per cent rate on station, tunnel, and track facilities, and 4.5 per cent on power. The commuters suggest 4 per cent on the former. Both interveners base their view on the cost of money at the time of construction. The annual payment of the Long Island as interest on investment, omitting taxes, would be approximately $2,400,000 on the 6 per cent basis, $2,000,000 on the 5 per cent basis, and $1,600,000 on the 4 per cent basis. Under the terms of the present agreement, the Long Island's payment of interest in 1928 was $1,361,842.

To state in summary the conclusions reached from the evidence, the proposed agreement imposes unreasonable terms upon the Long Island in respect of the inclusion of the entire station in the investment in zone 1, and the inclusion of all operating expenses, maintenance, and taxes [fol. 41] connected with the station, the indiscriminate application of the wheelage ratio both to basic values and to expenses, and the employment of 6 per cent as the annual rate of interest on the value of the facilities. Upon the facts presented we find that the present and future public convenience and necessity require the continued operation by the Long Island, under trackage rights, over the railroad of the Terminal Company as described in the record, but that the terms of the agreement dated November 13, 1928, proposed to govern such operation, are not just and reasonable. An order will be entered denying that part of the application which is under section 1 (18) of the act, without prejudice to the submission of a modified contract, and dismissing that part of the application which requests an order under section 3 (4).

Order

Entered March 18, 1930

A hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the application of the Pennsylvania Railroad Company and the Long Island Railroad Company for a certificate of public convenience and necessity authorizing the latter to operate under trackage rights over the railroad of the Pennsylvania Tunnel & Terminal Company in New York, N. Y., under the terms of a proposed contract dated November 13, 1928, as described in the application and report aforesaid, be, and it is hereby, denied without prejudice.

It is further ordered, That the application of the Pennsylvania Railroad Company and the Long Island Railroad Company for an order under section 3(4) of the act requiring the use by the latter of the aforesaid railroad and facilities of the Pennsylvania Tunnel & Terminal Company under

the terms of the aforesaid contract, be and it is hereby, dismissed.

By the commission, division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 42] Exhibit "B" to Answer of I. C. C.

F-4761

Interstate Commerce Commission

Finance Docket No. 7308

Long Island Railroad Company Trackage

Submitted October 20, 1931. Decided February 8, 1932

Upon further hearing, certificate issued authorizing the continued operation by the Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue, in Sunnyside yard, and the Pennsylvania Station, New York, N. Y., including the joint use of said yard, station, and appurtenant facilities. Conditions prescribed. Previous report, 162 I. C. C. 218.

Alfred A. Gardner, D. P. Williams, and Joseph F. Keany for applicants.

Arthur J. W. Hilly, Vincent Victory, M. Maldwin Fertig, and Harry Hertzoff for city of New York; George H. Stover and Edward M. Deegan for Transit Commission of State of New York; Maurice Hotchner for Association of Long Island Commuters, Incorporated; Howard C. Wilson for village of Lynbrook, N. Y., and for Nassau County Village Officials' Association; W. F. Walternath for Nassau County Civic Federation, interveners.

Report of the Commission on Further Hearing

Division 4, Commissioners Meyer, Atchison, and Mahaffie

By Division 4:

Exceptions were filed to the supplemental report proposed by the examiner, and further oral argument was had. Our conclusions differ from those of the examiner with respect to the issue of a certificate.

The original application in this proceeding was for a certificate under section 1 (18) of the interstate commerce act authorizing The Long Island Railroad Company to operate, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company, The Pennsylvania Railroad Company, lessee, between Sunnyside yard and the passenger terminal in New York City, a distance of 4.2 miles. This operation had been going on since the completion of the terminal and its approaches in September, 1910, but the applicants desired to make important changes in the terms and conditions of the joint operating agreement which took effect in 1923, technically expired on December 31, 1925, and was extended for one year. The application also contained a request for an [fol. 43] order under section 3 (4) of the act, requiring the use of the facilities by the Long Island on the terms and for the compensation stated. An order was entered on March 18, 1930, dismissing that part of the application which was for an order under section 3 (4), and denying that part which was under section 1 (18). A finding was announced, however, that the public convenience and necessity required the continued operation by the Long Island, under trackage rights, over the railroad of the Terminal Company as described in the application, but that the terms of the proposed agreement submitted with the application were not just and reasonable. Long Island R. Co. Trackage, 162 I. C. C. 218. Over the objections of the interveners, we held that our jurisdiction under section 1 (18) extended to the terms and conditions governing the Long Island's trackage operation.

The existing agreement executed by the Long Island and the Pennsylvania is dated July 28, 1925. It was approved by the Transit Commission after extended hearings and investigation and was made retroactive to July 1, 1923. The tentative agreement accompanying the original application filed with us was dated November 13, 1928. On December 27, 1930, the applicants renewed their request for a certificate under section 1 (18), presenting with their petition a new set of terms in the form of a modified agreement dated December 23, 1930.

The Pennsylvania's facilities which are used by the Long Island and are involved in the case may be described briefly as follows, the investments or valuations being as of July 1, 1928:

Zone 1:		
Bounded by Sixth Avenue, Thirty-first Street, Tenth Avenue, and Thirty-third Street, Manhattan, and including:		
(a) The Pennsylvania Terminal building above track level, and one-half the service plan (investment)	$15,000,000.00	
(b) The yard and tracks (investment)	31,896,746.94	
		$46,896,746.94
Zone 2:		
Tunnels east of zone 1 and under the East River, and tracks connecting at Harold Avenue, borough of Queens, with the Long Island's lines (investment)		32,605,521.38
Zone 3:		
Sunnyside yard and adjacent facilities near Harold Avenue (investment)		8,623,170.90
Power:		
Electric-power plant in Long Island City, and the distribution system (investment)		10,356,032.03

The values stated are not objected to *per se* by the interveners.

[fol. 44] It is unnecessary to repeat here the details of former reports, which describe the various changes and proposed changes in the terms of operating contracts applying to the Long Island's use of these facilities for extending its passenger service into the city of New York. Under the arrangement now in effect the station building above track level and its appurtenant service plant are entirely excluded from the facilities for which rental is paid. All the other facilities are included, the Long Island's rental being calculated on the basis of the proportional number of car movements in each zone monthly. This proportion or ratio is applied to the total cost of operation, to taxes, and to interest on the investment. The rate of interest is 4 per cent per annum, except on the power plant and electric distribution system, which carry 4.5 per cent.

The proposed agreement of November 13, 1928, which we disapproved as not being just and reasonable, would have increased the Long Island's annual rental by approximately $1,600,000. Under that plan the rate of interest was to be 6 per cent, the station was to be included, and the wheelage basis of apportionment was to be continued as the method of determining the Long Island's payment for interest on the investment, operating expenses, and taxes on all the joint property in all the zones. We said in our prior report that this contract would impose unreasonable terms upon the Long Island in respect of the inclusion of the entire

station in the investment of zone 1, the inclusion of all operating expenses, maintenance, and taxes connected with the station, the general application of the wheelage ratio both to basic values and to expenses, and the employment of 6 per cent as the annual rate of interest on the value of the facilities.

In an effort to meet our criticisms, the applicants prepared and submitted the modified agreement of December 23, 1930. The station building and its service plant are therein omitted from the facilities for which the Long Island is to pay rental in so far as interest on investment and taxes are concerned. The operating cost of these facilities, however, would be shared, the Long Island paying one-fifth of such cost monthly. To support the fairness of this proportion, the applicants introduced statements showing a distribution of the time of station employees of all classes. No credit to the Long Island is proposed to be allowed for privileges, rents, and concessions in the station, on the theory that such an allowance would be unwarranted when the Long Island is not required to bear any part of the interest and taxes on the building. In 1930, the gross revenues to the Pennsylvania from concessions in the station and zone 1 exceeded $1,000,000, of which approximately one-third was from concessions in the Long Island con- [fol. 45] course. With respect to the track-level facilities in all zones, and the power and distribution system, the latest agreement provides that the Long Island shall pay a wheelage proportion of the interest at 5.75 per cent per annum on the investments as of July 1, 1928, together with the same proportion of operating expenses, maintenance, and taxes.

The wheelage ratio is also proposed to be applied to the annual interest at 5.75 per cent on all additions and betterments, including those in the station building itself, made subsequent to July 1, 1928. As regards the propriety of this particular provision, when the Long Island is not to pay any part of the taxes or interest on the original station investment, the applicants explain that any station improvements made subsequent to July 1, 1928, would probably be in large part for the benefit of the Long Island. The assumption seems questionable, and Article IV, A (b), of the contract should be revised accordingly to exclude station improvements as an element of the Long Island rental payment.

As in the agreement of November 13, 1928, disapproved by us, the term of the new contract is 20 years, with provision for continuation from year to year thereafter unless terminated by at least six months' notice by either party. The effective date is January 1, 1931. At the ends of 5-year periods, and upon 60 days' written notice, either party may seek a modification in the rate of interest for rentals or in the bases upon which such interest are computed, and in the event the parties are unable to agree in respect of any such proposed modifications the question shall be submitted to arbitrators in the manner provided for in a later article of the contract. This clause was mentioned but not criticized in former reports. It would leave the applicants, which are closely affiliated, a large measure of freedom in changing important terms of the contract after the expiration of five years. To avoid this undesirable situation, the term of the contract as stated in Article XIII should be changed from an initial period of 20 years to one of five years, and Article VI of the agreement should be omitted. Any substantial modification proposed in the terms and conditions of this operation should be covered by a new agreement and an appropriate application should be made to us for authority to operate under such terms.

The effect of introducing the terms of the agreement of December 23, 1930, now before us, may be seen from the following comparison of total payments by Long Island:

[fol. 46]

	Present basis	Proposed basis
Year 1928:		
Interest, zones 1, 2, and 3	$1,361,842	$1,941,318
Taxes, zones 1, 2, and 3	550,398	550,398
Operation, zones 1, 2, and 3	459,902	902,105
Power	324,416	334,686
Direct charges	138,623	138,623
Totals	2,835,181	3,867,130
Year 1929:		
Interest, zones 1, 2, and 3	1,332,940	1,905,899
Taxes, zones 1, 2, and 3	547,276	547,276
Operation, zones 1, 2, and 3	448,906	934,220
Power	331,253	341,006
Direct charges	131,591	131,591
Totals	2,791,966	3,859,992
Year 1930:		
Interest, zones 1, 2, and 3	1,386,153	1,979,425
Taxes, zones 1, 2, and 3	571,184	571,184
Operation, zones 1, 2, and 3	476,873	885,392
Power	362,562	372,799
Direct charges	121,425	121,425
Totals	2,918,197	3,930,225

The wheelage ratios, representing the proportion of Long Island cars handled in each of the three zones in 1930, were zone 1, 42.08 per cent; zone 2, 60.49 per cent; zone 3, 7.65 per cent.

It is noted that the major part of the increase of more than $1,000,000 in the Long Island's annual rental under the new proposal is brought about by the change in interest rate from 4 and 4.5 per cent to a uniform rate of 5.75 per cent, and by the charging of 20 per cent of the operating expenses of the station to the Long Island. In connection with the first of these proposed changes, the applicants cite the commission's finding that 5.75 per cent will constitute a fair return upon the aggregate value of railway property in all rate groups or territories. Reduced Rates, 1922, 68 I. C. C. 676. With respect to this argument, it may be suggested that the general ruling cited does not necessarily apply to individual terminal properties or to contractual relations between carriers without regard to special circumstances. Under the lease of the Terminal Company's property to the Pennsylvania, authorized by us in Acquisition by P. R. R., 145 I. C. C. 283, the Pennsylvania pays 5 per cent on $50,000,000 par value of capital stock of the Terminal Company, and 4.5 per cent on $58,600,577 principal amount of its bonds. As was stated in our prior report in the instant case, the average cost of money during the period when the terminal was constructed was about 5 per cent. Various rates of interest on investment are incorporated in trackage contracts which have come before us for approval, but circumstances differ and no universal, fixed rate is practicable or desirable. In [fol. 47] the situation here, the facts show that a uniform rate of 5 per cent would be just and reasonable to both parties.

Objection is raised to the introduction of the station operating and maintenance expenses into the Long Island's rental as now proposed, on the grounds that such small part of these expenses with which the Long Island would be properly chargeable, considering its alleged slight use of this extensive and elaborate station, is more than outweighed by adopting the wheelage method in fixing the rental of the facilities which are at track level, i. e., facilities other than the station building above track level. Objection is also raised to the inclusion of all the land in zone 1 in the investment upon which the Long Island pays interest.

In the existing agreement, the Transit Commission approved the use of the wheelage method for these other facilities only because any injustice of that method to the Long Island was considered to be mitigated by omitting all interest, taxes, and operating charges in connection with the station building, and further, by computing interest at only 4 per cent on the investment in such other facilities within the three zones. As explaining their objection to the wheelage ratio, the interveners point to the steadily increasing traffic of the Long Island up to the present time, while the Pennsylvania's passenger business remained the same or decreased, and to the constant increase in the Long Island's rental based on the rising wheelage ratio, without regard to the additional actual costs which that carrier's increased traffic may have caused. The Transit Commission points out that elimination of station operation, interest, and taxes, for which elimination it was responsible in 1925, represented $741,762 in annual charges to the joint account. Outside the station building, the low rate of interest accounts for further elimination of charges to which the wheelage ratio would apply. These mitigating factors were considered to offset the objections to using the wheelage method of apportionment, particularly when the taxes and the operating expenses represented facilities more extensive than the Long Island would require for its service. The wheelage method is held largely accountable for the increase of nearly $100,000 a year in the Long Island's rental payments since 1924, and it is true that there has been a steady and substantial increase in the proportion of Long Island cars. There has also been an increase in the basic costs, but not to a corresponding degree.

It is contended that the mitigating factors reflected in the terms of the present agreement would be much impaired by the requirement that the Long Island shall pay 20 per cent of [fol. 48] the operating expenses of the station, thereby adding more than $400,000 to the present annual rental charge. The applicant's distribution of the operating cost of the station was questioned, the above mentioned expenditure was stated to be more than the Long Island's operation could possibly entail and attention was called to the contingency that the Long Island would be required to pay this fixed proportion of a total expense which would vary with the Pennsylvania's rather than the Long Island's activities. Accord-

ing to some of the applicant's testimony, 20 per cent is less than either the square-foot or cubic-foot proportion which the exit concourse in the station bears to the total building. In his first proposed report the examiner suggested that an equitable division of the terminal above track level would be approximated by assigning to the Long Island such part of the entire building as is represented by the exit concourse, and that this ratio should be used in determining the Long Island's proportion of such total station expenses as could not be assigned directly to either carrier. On this basis, the proposed allocation is apparently not disadvantageous to the Long Island. With respect to the car movements in zone 1, the proposed 20 per cent is less than one-half the proportion of Long Island car movements at the present time. With respect to the total number of passengers using the terminal, of which number about 82 per cent are Long Island passengers, the proposed ratio is extremely low. As has been explained in former reports, there is no exact method by which the use of the station building as a whole may be divided between the Long Island on the one hand and the Pennsylvania and its other tenant carriers on the other hand. The extensive testimony pertaining to this question only emphasizes the fact that no mathematical solution of the problem can be expected. But the adoption of a fairly approximate basis of apportionment of operating expenses is nevertheless possible. From all the evidence and agreements presented, the proposed 20 per cent apportionment of station expenses can not be found unreasonable, and it may be properly retained as a provision of the contract.

For the facilities other than the station, the application of the wheelage ratio to total interest, taxes, and operating charges, in the manner prescribed both by the present and proposed contracts is evidently the most convenient and practicable measure of use that is available. Notably in the case of the tunnels in zone 2, a closer approach to a division of the facilities on a physical basis could be worked out. But it would be difficult to reach a satisfactory result based on the different requirements of the Long Island and the Pennsylvania for terminal facilities in New York City, and the difference in traffic density and in unit costs of operation. [fol. 49] The Transit Commission, as has been explained, considers that the terms of the present agreement provide a balance between the results of using the wheelage ratio and

those produced by leaving the station building entirely out of the rental and adopting a low rate of interest for the other facilities. That commission insists that its jurisdiction is exclusive, and it opposes any changes in the contract increasing the Long Island rental. The applicants have withdrawn their first proposal to apply the wheelage ratio to the investment cost, taxes, and operating expense of the station above track level and the service plant. The new proposal in this respect, and influenced by the interest rate of 5 per cent which we shall authorize, is, in our opinion, a fair adjustment of the various considerations involved. As regards the Long Island's actual need of, and real benefit from, this city terminal, we are inclined to the belief that the advantages of the facilities have been unduly minimized by the interveners, and are important enough to outweigh any alleged injustice which the present proposal, as modified, may be thought to impose upon the Long Island.

In connection with rents and concessions, no reason is apparent for not crediting the joint account with the revenues received from the track level concessions as was proposed to be done in the original application. In 1930, these revenues amounted to $24,447 in zone 2, and $66,025 in zone 3. The theory upon which the station concessions were eliminated in connection with the station clearly does not apply to zones 2 and 3, for the reason that in those zones the Long Island would be obligated to pay a rental covering interest on cost and taxes. Article IV should include an appropriate provision for crediting rents and concessions in zones 2 and 3.

It is unnecessary to repeat what was said in our prior report with respect to our jurisdiction. The agreement under the terms of which the Long Island operation is being carried on can not be assumed to be controlling even though approved by the Transit Commission.

Upon the facts presented on the record, including the further hearing and argument, we find that the present and future public convenience and necessity require the continued operation of The Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company, the Pennsylvania Railroad Company lessee, as described, provided the terms and conditions of the proposed operating agreement be modified in the respects and to the extent herein indicated.

An appropriate certificate and order prescribing conditions will be issued.

[fol. 50] Certificate and Order—Issued February 8, 1932

Hearings and investigation of the matters and things involved in this proceeding having been had, and said division having, on March 18, 1930, and on the above date, made and filed reports containing its findings of fact and conclusions thereon, which reports are hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue in Sunnyside yard, and the Pennsylvania station, New York, N. Y., including the joint use of said yard, station, and appurtenant facilities described in the record, under the terms and conditions of the proposed joint operating agreement dated December 23, 1930; Provided, however, and this certificate is issued upon the express condition, that said terms and conditions be modified in the respects and to the extent indicated in the accompanying report, to wit: In ascertaining currently the rental payable, additions and betterments to the Pennsylvania station building and service plant made subsequent to July 1, 1928, shall be excluded; the term of the aforesaid agreement shall be five years, with provision for its extension from year to year unless terminated by at least six months' notice by either party to the other; Article VI of the proposed contract shall be omitted; the rate of interest to be applied on the investment cost of all jointly used property and facilities, according to the provisions of said agreement which are not otherwise affected by the changes herein prescribed, shall be 5 per cent per annum; and, the joint accounts of the parties shall be credited currently with all revenues from rents, privileges, and concessions within zones 2 and 3.

It is ordered, That, if within 60 days from the date hereof, The Long Island Railroad Company and The Pennsylvania Railroad Company shall jointly file with this commisison written notice of the acceptance by them of the foregoing conditions, this certificate shall take effect and be in force from and after 30 days from the filing of said acceptance;

and in such event the said carriers, within 30 days from the date of such acceptance, shall file with this commission duly verified copies of the joint operating agreement as modified in accordance with said conditions and executed.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 51] IN UNITED STATES DISTRICT COURT

In Equity. No. 66258

[Title omitted]

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY AND THE LONG ISLAND RAILROAD COMPANY—Filed April 29, 1932

The Pennsylvania Railroad Company and The Long Island Railroad Company, respondents herein, now and at all times hereafter saving and reserving to themselves all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition contained, answer and say in this their joint and several answer:

I

Answering paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 10, 13, 14, 15, 16, 17, 18, these respondents admit that the allegations therein contained are true.

II

Answering paragraph 9, these respondents admit the allegations thereof except the allegation that the agreement approved July 28, 1925, is the agreement under which operation is now carried on, which allegation they deny. They affirmatively allege that said agreement by its terms expired December 31st 1925 and was thereafter extended for one year as set forth in paragraph 10 of the petition, [fol. 52] at the expiration of which time, namely December 31, 1926, respondents allege that said agreement expired.

III

Answering paragraph 11, these respondents admit that the rental payable by the Long Island to the Pennsylvania

for trackage rights increased from $519,173.00 in 1911 to the sum of $2,918,197.00 in 1930. They deny that the rental so payable was payable with the approval of the Transit Commission or its predecessor beyond December 31st 1926, and they affirmatively allege that the last of the agreements approved by the Transit Commission expired December 31st 1926, and that the rental payable for trackage rights enjoyed subsequently to December 31st 1926, was not under and by virtue of any agreement approved by the Transit Commission or its predecessor. These respondents admit, however, that the said rental payable subsequently to December 31, 1926, and until the agreement made pursuant to the certificate and order of the Interstate Commerce Commission became effective was computed and paid in the same manner as if said expired agreement had been in force and effect.

IV

Answering paragraph 12, these respondents admit that since 1910, the operation by the Long Island under trackage rights has been continuous. They deny that said operation has been conducted during all of the period since 1910 according to the terms and conditions contained in agreements approved by the Transit Commission or its predecessor. They affirmatively allege that the last agreement approved by the Transit Commission or by its predecessor expired December 31st 1926.

V

Answering paragraph 19 these respondents admit the allegation that the operation for which the said certificate [fol. 53] of February 8, 1932, was granted is the same as that now conducted and, since 1910, continuously conducted. They admit the allegation that the facilities embraced in the agreement entered into pursuant to said certificate of February 8, 1932, are the same as those embraced in the agreement approved July 28, 1925, by the Transit Commission. They deny, however, that said agreement approved July 28, 1925, by the Transit Commission is the existing agreement and affirmatively allege that said agreement approved July 28, 1925, expired December 31, 1926. They deny the allegations that the agreement entered into pursuant to said certificate of February 8, 1932,

will secure to the Long Island no increased benefit or facilities and deny the allegations that it merely modifies the terms of operation which deal with the rental and increases the rental to be paid by the Long Island to the Pennsylvania by more than one million dollars per annum.

VI

Answering paragraph 20 these respondents deny each and every allegation contained therein.

VII

Answering paragraph 21, these respondents deny the allegations that after the Pennsylvania and the Long Island have, under color of said certificate and order, abrogated the terms and conditions imposed by the State of New York, they can evade the terms and conditions of the agreement approved by the Interstate Commerce Commission by entering into a new agreement which will provide for the rental which both the Transit Commission and the Interstate Commerce Commission have found to be unreasonable. They deny the allegations that if they voluntarily submit the new agreement to the Interstate Commerce Commission, the proceeding will be one for which the Interstate Commerce Act makes no provision and in which the State of New York will be deprived of the right to be [fol. 54] heard, which is conferred by paragraph (19) of Section 1 of said Act.

Further answering paragraph 21 these respondents admit that the effect of the condition attached to the said certificate or order will be to enable the carriers to ignore the conditions imposed by the Transit Commission but they deny that the effect of the condition attached to the certificate or order will be to enable the Pennsylvania to impose excessive expenses upon the intrastate traffic of the Long Island and to disregard the authority of said State and the jurisdiction of the Transit Commission and thereby subject the State of New York and the Transit Commission to irreparable loss, damage and injury.

VIII

Answering paragraph 22 these respondents admit that the Long Island Railroad Company unless enjoined will

make the payments permitted by the new agreement and deny each and every other allegation in said paragraph contained.

IX

Answering paragraph 23 these respondents say they are without knowledge as to whether petitioners have exhausted their available means for securing a revocation of said order and certificate of the Interstate Commerce Commission.

X

Further and affirmatively answering the allegations of the petition these respondents allege that within sixty days from the date of the order of the Interstate Commerce Commission described in paragraph 17 of the petition, to wit, on the 2nd day of March, 1932, they did jointly file with the Interstate Commerce Commission written notice of the acceptance by them of the conditions set forth in said order and within thirty days from the date of such acceptance, to wit, on the 12th day of March, 1932, they did file with the Interstate Commerce Commission duly verified copies of the joint operating agreement as modified in accordance with said conditions and executed.

[fol. 55]

XI

Further and affirmatively answering the allegations of the petition, these respondents allege that the Interstate Commerce Commission was and is fully authorized by law to make and enter the certificate and orders complained of; that in making and entering said certificate and orders it accorded full opportunity to all parties, including the petitioners herein, to appear, be heard, and present such testimony and arguments as they desired; that said certificate and orders are amply supported by substantial evidence, and that in making and entering them the Commission did not abuse its discretion, act arbitrarily, or otherwise in contravention of the authority conferred upon it by the Interstate Commerce Act, and particularly paragraphs 18-21 of Sec. 1 thereof.

XII

Except as herein expressly admitted these respondents deny the truth of each and every allegation contained in

the petition insofar as they conflict either with the allegations herein or with the statements or conclusions of fact contained in said reports and orders of said Commission.

Wherefore, having fully answered the petition, these respondents pray that the relief therein sought be denied and the petition dismissed at the cost of the petitioners, and that these respondents have the benefit of such other and further orders, decrees and relief as may be just and proper.

The Pennsylvania Railroad Company, by Joseph F. Keany, Solicitor, Room 375 Pennsylvania Station, New York, N. Y. The Long Island Railroad Company, by Joseph F. Keany, Solicitor, Room 375 Pennsylvania Station, New York, N. Y. Alfred A. Gardner, D. P. Williams, of Counsel.

[fols. 56-58] *Duly sworn to by George LeBoutillier and F. J. Fell, Jr. Jurats omitted in printing.*

[fol. 59] In United States District Court

In Equity. No. 66258

[Title omitted]

Answer of United States of America—Filed May 3, 1932

United States of America, one of the respondents in the above-entitled cause, for answer to the petition filed therein against it answers and says:

I

United States admits for the purpose of this proceeding the truth of the matters and things alleged in the opening paragraph and paragraphs 1 to 12, both inclusive, of the petition, with this exception:

(a) It denies the allegation in said paragraph 9 that the agreement approved July 28, 1925, is the agreement through which the operation described in the petition is carried on.

II

United States admits for the purpose of this proceeding the truth of the matters and things alleged in paragraphs 13 to 19, both inclusive, of the petition, with the exception of the allegations made in the last two sentences in said paragraph 19, and United States says that the allegations contained in those two sentences are, even if true, incompetent, irrelevant and immaterial to any issue raised or which may properly be raised in this suit.

III

United States denies the allegations made and contained [fol. 60] in paragraphs 20 and 21 of the petition, with the exception of the allegation in said paragraph 21 that the effect of the condition attached to the certificate or order of the Interstate Commerce Commission will be to enable the carriers to ignore the conditions imposed thereon by the Transit Commission, which allegation United States admits, and United States admits the further allegation in said paragraph 21 that the effect of the condition attached to said certificate or order is to enable the carriers to disregard any claimed exercise of authority or jurisdiction by either the State of New York or the Transit Commission over the subject matter of said certificate.

IV

Answering paragraph 22, United States admits that the Long Island Railroad Company, unless enjoined, may make the payments permitted by the new agreement, and denies each and every other allegation contained in said paragraph.

V

United States says that it has no knoweldge, information or belief concerning the allegations contained in paragraph 23 of the petition, and it, therefore, neither admits nor denies said allegations.

Except as herein expressly admitted, United States denies the truth of each and every allegation contained in the petition.

Wherefore, having fully answered the petition, United States prays that the relief therein sought be denied and

the petition dismissed with costs to the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, Assistant to the Attorney General. George Z. Medalie, United States Attorney.

[fols. 61 & 62] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 66367

THE STATE OF NEW YORK, Petitioner,

versus

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, and The Pennsylvania Railroad Company, Respondents

PETITION—Filed April 15, 1932

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your petitioner, by its Attorney-General, brings this petition against the United States of America, under the Act of Congress approved October 22, 1913, 28 U. S. C. A. 41 (28), 43-48, and pursuant thereto hereby sues to enjoin, set aside, suspend and annul a certificate or order of the Interstate Commerce Commission in a proceeding designated as Finance Docket No. 7308, entered February 8, 1932, whereby it is certified that the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company, under trackage [fols. 63-75] rights, over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company between Harold Avenue in Sunnyside Yard and the Pennsylvania Station, New York, N. Y., icluding the joint use of said yard, station and certain appurtenant facilities, provided, and upon the express condition, that the terms and conditions under which said operation is carried on be modified in the re-

spects and to the extent therein indicated; and in support thereof petitioner respectfully shows to the Court:

1. Your petitioner is a state having its capital and seat of government in the City of Albany, New York, and exercises through its Legislature the powers and duties of sovereignty within its territorial limits under and by virtue of its constitution, and is one of the States of the United States.

* * * * * * *

Balance of petition omitted as it is identical with petition of Transit Commission.

[fol. 76] IN UNITED STATES DISTRICT COURT

In Equity. No. E 66367

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed April 22, 1932

To the Honorable Judges of said Court:

In accordance with the provisions of Section 212 of the Judicial Code, 36 St. L. 1150 (U. S. Code, Sup. II, Title 28, Sec. 45a), we hereby enter the appearance of the Interstate Commerce Commission, as a party respondent, and of ourselves as its counsel, in the above-entitled suit.

Daniel W. Knowlton, Chief Counsel. H. L. Underwood, Attorney.

[fol. 77] IN UNITED STATES DISTRICT COURT

In Equity. No. E 66367

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION—Filed April 22, 1932

The Interstate Commerce Commission, intervening respondent herein, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in

the petitioner's petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs numbered 1 to 11, inclusive, and paragraph 13 of the petition, the Commission admits, for the purposes of this suit, that the allegations therein contained are true, except the allegation in paragraph 10 that the agreement approved July 28, 1925, is the agreement under which operation is now carried on, which allegation it denies.

II

Answering paragraph 12 of the petition, the Commission says that it is without knowledge or information sufficient to form a belief as to the truth of the allegation therein contained as to amount paid by the Long Island Railroad Company to the Pennsylvania Railroad Company as and [fol. 78] for rental for the trackage rights described for the period specified; and therefore it neither admits nor denies said allegation.

III

For answer to the allegations contained in paragraphs numbered 14 to 24, inclusive, of the said petition, the Commission admits and alleges that it made and issued the certificate of public convenience and necessity and order, dated February 8, 1932, set forth in paragraph 18 of the petition herein, in a proceeding then pending before it entitled Finance Docket No. 7308, Long Island Railroad Company Trackage; that said proceeding was initiated by the filing of a joint application of the Pennsylvania Railroad Company and the Long Island Railroad Company for a certificate of public convenience and necessity under Section 1 (18) of the Interstate Commerce Act permitting the operation by the Long Island Railroad Company, under trackage rights, over that portion of the railroad of the Pennsylvania Tunnel & Terminal Railroad, then and now leased to the said Pennsylvania Railroad Company, between Harold Avenue in Sunnyside Yard, borough of Queens, and the Pennsylvania Station, borough of Manhattan, City of New York, including the use of said yard

and station and the facilities and appurtenances thereof; that said application also sought an order under Section 3 (4) of the Interstate Commerce Act requiring the use of said tracks and facilities by the Long Island Railroad Company on the terms and conditions agreed upon by the said applicants; that in said proceeding several parties intervened, including the Transit Commission of the State of New York; that full hearings were held, and thereafter the Commission made, entered and served upon all the parties in said proceeding its report and order, dated March 18, 1930, wherein and whereby it found that the present and future public convenience and necessity require the continued operation by the Long Island Railroad, under trackage rights, over the railroad of the Terminal Company as described in the record of the proceeding, but that the terms and conditions of the agreement covering such operation were not just and reasonable; that it denied that part of the application under Section 1 (18) without prejudice to the submission of a new or modified contract, and [fol. 79] dismissed that part of the application for an order under Section 3 (4) of the Interstate Commerce Act; that thereafter, and on December 27, 1930, the Pennsylvania Railroad Company and the Long Island Railroad Company renewed their request for a certificate under Section 1 (18), presenting a new set of terms in the form of a modified agreement; that upon consideration thereof, the Commission made and issued a report on further hearing, dated February 8, 1932, and on that date issued a certificate and order certifying that the public convenience and necessity require the operation, under trackage rights, as requested, but subject to certain conditions in said certificate set forth. A copy of said original report and order and of the further report and certificate and order are attached hereto, marked Exhibits A and B, respectively. For full information as to its findings and requirements and action in the premises, the Commission respectfully refers the Court to the said reports and certificate and order.

This Commission alleges that in the said proceeding, and prior to the making, entering and serving of said reports and certificate and order, the parties thereto, including the said Transit Commission, were, and each of them was, accorded the full hearing provided for by the Interstate

Commerce Act; that in said hearing a large volume of testimony was taken and other evidence bearing upon the matters covered in said reports and certificate and order was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of the Transit Commission; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including the particular questions raised by the petitioner in this suit, whereupon the Commission determined said matters and made and entered its said reports and certificate and order; that said reports and certificate and order included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by its reports, the Commission made the findings and stated the conclusions upon which the certificate and order is based.

[fol. 80] The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid; that in making said reports and certificate and order it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including all material matters covered by the allegations of the petition herein; that said certificate and order of February 8, 1932, was not made or issued either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said certificate and order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the petition.

Further answering paragraph 21 of the petition, the Commission denies that in authorizing and issuing the certificate of public convenience and necessity and order, it acted without authority or in excess of its authority, and further denies that its certificate and order is null and void for the reasons set forth in said paragraph 21 or for any other reason. On the contrary, the Commission avers

that under and by the provisions of the Interstate Commerce Act it is vested with power and authority in matters of the kind complained of by petitioner; that the power and authority of the Commission with respect to such matters is plenary and exclusive and is paramount to state authority in the matter of its exercise and in the results attending action in pursuance of the rights or privileges conferred in the exercise of that power and authority. The Commission further specifically denies the allegation contained in subparagraph (d) of said paragraph 21, that the Transit Commission of the State of New York has jurisdiction and power to permit and approve operation under trackage rights such as that which is the subject of the petition, and to attach terms and conditions thereto.

Answering specifically paragraph 19 of the petition, the Commission admits the filing by the said Transit Commission of an application for rehearing or reargument in the proceeding Finance Docket No. 7308, and that the Commission denied said application.

[fol. 81] Further answering paragraphs 22 and 23 of the petition, the Commission denies that either the effect of its certificate and order, or the enforcement thereof, or action under the authority thereof, will be to subject either the petitioner or the said Transit Commission to either irreparable loss, or damage, or injury for the reasons set forth in those paragraphs or for any other reason.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order of March 18, 1930, and the further report and certificate and order of February 8, 1932, which reports and certificate and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by H. L. Underwood, Attorney. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fol. 82] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

(Exhibit A—Printed document entitled "Interstate Commerce Commission—Finance Docket No. 7308—Long Island Railroad Company Trackage—F4073"; Exhibit B—Printed document entitled "Interstate Commerce Commission—Finance Docket No. 7308—Long Island Railroad Company Trackage—F4761").

[fol. 83] IN UNITED STATES DISTRICT COURT

In Equity. No. 66367

[Title omitted]

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY AND THE LONG ISLAND RAILROAD COMPANY—Filed April 29, 1932

The Pennsylvania Railroad Company and The Long Island Railroad Company, respondents herein, now and at all times hereafter saving and reserving to themselves all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition contained, answer and say in this their joint and several answer:

I

Answering paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 14, 15, 16, 17, 18, 19, these respondents admit that the allegations therein contained are true.

II

Answering paragraph 10, these respondents admit the allegations thereof except the allegation that the agreement approved July 28, 1925, is the agreement under which operation is now carried on, which allegation they deny. They affirmatively allege that said agreement by its terms expired December 31st, 1925 and was thereafter extended for one year as set forth in paragraph 11 of the petition, [fol. 84] at the expiration of which time, namely December 31, 1926, respondents allege that said agreement expired.

III

Answering paragraph 12, these respondents admit that the rental payable by the Long Island to the Pennsylvania

for trackage rights increased from $519,173.00 in 1911 to the sum of $2,918,197.00 in 1930. They deny that the rental so payable was payable with the approval of the Transit Commission or its predecessor beyond December 31st 1926, and they affirmatively allege that the last of the agreements approved by the Transit Commission expired December 31st 1926, and that the rental payable for trackage rights enjoyed subsequently to December 31st 1926, was not under and by virtue of any agreement approved by the Transit Commission or its predecessor. These respondents admit, however, that the said rental payable subsequently to December 31, 1926, and until the agreement made pursuant to the certificate and order of the Interstate Commerce Commission became effective was computed and paid in the same manner as if said expired agreement had been in force and effect.

IV

Answering paragraph 13, these respondents admit that since 1910, the operation by the Long Island under trackage rights has been continuous. They deny that said operation has been conducted during all of the period since 1910 according to the terms and conditions contained in agreements approved by the Transit Commission or its predecessor. They affirmatively allege that the last agreement approved by the Transit Commission or by its predecessor expired December 31st 1926.

V

Answering paragraph 20 these respondents admit the allegation that the operation for which the said certificate of February 8, 1932, was granted is the same as that now conducted and, since 1910, continuously conducted. They admit the allegation that the facilities embraced in the [fol. 85] agreement entered into pursuant to said certificate of February 8, 1932, are the same as those embraced in the agreement approved July 28, 1925, by the Transit Commission. They deny, however, that said agreement approved July 28, 1925, by the Transit Commission is the existing agreement and affirmatively allege that said agreement approved July 28, 1925, expired December 31, 1926. They deny the allegations that the agreement entered into pursuant to said certificate of February 8, 1932, will secure

to the Long Island no increased benefit or facilities and deny the allegations that it merely modifies the terms of operation which deal with the rental and increases the rental to be paid by the Long Island to the Pennsylvania by more than one million dollars per annum.

VI

Answering paragraph 21 these respondents deny each and every allegation contained therein.

VII

Answering paragraph 22, these respondents deny the allegations that after the Pennsylvania and the Long Island have, under color of said certificate and order, abrogated the terms and conditions imposed by the State of New York, they can evade the terms and conditions of the agreement approved by the Interstate Commerce Commission by entering into a new agreement which will provide for the rental which both the Transit Commission and the Interstate Commerce Commission have found to be unreasonable. They deny the allegations that if they voluntarily submit the new agreement to the Interstate Commerce Commission, the proceeding will be one for which the Interstate Commerce Act makes no provision and in which the State of New York will be deprived of the right to be heard, which is conferred by paragraph (19) of Section 1 of said Act.

Further answering paragraph 22 these respondents admit that the effect of the conditions attached to the said certificate or order will be to enable the carriers to ignore [fol. 86] the conditions imposed by the Transit Commission but they deny that the effect of the condition attached to the certificate or order will be to enable the Pennsylvania to impose excessive expenses upon the intrastate traffic of the Long Island and to disregard the authority of said State and the jurisdiction of the Transit Commission and thereby subject the State of New York and the Transit Commission to irreparable loss, damage and injury.

VIII

Answering paragraph 23 these respondents admit that the Long Island Railroad Company unless enjoined will

make the payments permitted by the new agreement and deny each and every other allegation in said paragraph contained.

IX

Answering paragraph 24 these respondents say they are without knowledge as to whether petitioners have exhausted their available means for securing a revocation of said order and certificate of the Interstate Commerce Commission.

X

Further and affirmatively answering the allegations of the petition these respondents allege that within sixty days from the date of the order of the Interstate Commerce Commission described in paragraph 18 of the petition, to wit, on the 2nd day of March 1932, they did jointly file with the Interstate Commerce Commission written notice of the acceptance by them of the conditions set forth in said order and within thirty days from the date of such acceptance, to wit, on the 12th day of March 1932, they did file with the Interstate Commerce Commission duly verified copies of the joint operating agreement as modified in accordance with said conditions and executed.

XI

Further and affirmatively answering the allegations of the petition, these respondents allege that the Interstate Commerce Commission was and is fully authorized by law to make and enter the certificate and orders complained of; [fol. 87] that in making and entering said certificate and orders it accorded full opportunity to all parties, including the petitioners herein, to appear, be heard, and present such testimony and arguments as they desired; that said certificate and orders are amply supported by substantial evidence, and that in making and entering them the Commission did not abuse its discretion, act arbitrarily, or otherwise in contravention of the authority conferred upon it by the Interstate Commerce Act, and particularly paragraphs 18-21 of Sec. 1 thereof.

XII

Except as herein expressly admitted these respondents deny the truth of each and every allegation contained in

the petition in so far as they conflict either with the allegations herein or with the statements or conclusions of fact contained in said reports and orders of said Commission.

Wherefore, having fully answered the petition, these respondents pray that the relief therein sought be denied and the petition dismissed at the cost of the petitioners, and that these respondents have the benefit of such other and further orders, decrees and relief as may be just and proper.

The Pennsylvania Railroad Company, by Joseph F. Keany, Solicitor, Room 375 Pennsylvania Station, New York, N. Y. The Long Island Railroad Company, by Joseph F. Keany, Solicitor, Room 375 Pennsylvania Station, New York, N. Y. Alfred A. Gardner, D. P. Williams, of Counsel.

[fols. 88 & 89] *Duly sworn to by George Le Boutillier and F. J. Fell, Jr. Jurats omitted in printing.*

[fol. 90] In United States District Court

In Equity. No. 66367

[Title omitted]

Answer of United States of America—Filed May 5, 1932

United States of America, one of the respondents in the above-entitled cause, for answer to the petition filed therein against it answers and says:

I

United States admits for the purpose of this proceeding the truth of the matters and things alleged in the opening paragraph and paragraphs 1 to 20, both inclusive, of the petition, with these exceptions:

(a) United States denies the allegation in said paragraph 10 that the agreement approved July 28, 1925, is the agreement through which the operation described in the petition is carried on.

(b) United States says that the matters and things alleged in the last two sentences of said paragraph 20 are [fol. 91] incompetent, irrevelant and immaterial to any issue raised or which may properly be raised in this suit.

II

United States denies the allegations made and contained in paragraphs 21 and 22 of the petition, with the exception of the allegation in said paragraph 22 that the effect of the conditions attached to the certificate or order of the Interstate Commerce Commission will enable the carriers to ignore the conditions imposed by the Transit Commission, which allegation United States admits, and United States admits the further allegation in said paragraph 21 that the effect of said condition is to enable the carriers to disregard any attempted exercise of authority or jurisdiction by either the State of New York or the Transit Commission over the subject matter of said certificate.

III

Answering paragraph 23 of the petition, United States admits that the Long Island Railroad Company, unless enjoined, may make the payments permitted by the agreement described in said paragraph, but denies each and every other allegation contained in said paragraph.

IV

United States says that it has no knowledge, information or belief, concerning the allegations contained in paragraph 24, and, therefore, it neither admits nor denies said allegations.

Except as herein expressly admitted, United States denies the truth of each and every allegation contained in the petition.

[fol. 92] Wherefore, having fully answered the petition, United States prays that the relief therein sought be denied and the petition dismissed with costs to the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, Assistant to the Attorney General. George Z. Medalie, United States Attorney.

[fol. 93] IN UNITED STATES DISTRICT COURT

In Equity. No. 66258

[Title omitted]

ORDER TO SHOW CAUSE—Filed July 5, 1932

Whereas in the above entitled suit it has been made to appear from the verified petition presented to the undersigned, a district judge of the United States for the Southern District of New York, which petition was duly filed in the office of the Clerk of the said court on the 31st day of March, 1932, that petitioners herein may be entitled to an interlocutory injunction suspending and restraining the enforcement, operation and execution of, and setting aside a certain certificate and order made by the Interstate Commerce Commission, dated the 8th day of February, 1932, all as more fully set forth in said petition, it is

Ordered that the respondents herein, the United States of America, Interstate Commerce Commission, The Long Island Railroad Company and the Pennsylvania Railroad Company, appear before the Hon. Augustus N. Hand, United States Circuit Judge for the Second Circuit and the Hon. Robert P. Patterson, United States District Court Judge for the Southern District of New York, and the undersigned, said judges having been called by the undersigned to his assistance to hear and determine said petition in accordance with the provisions of the Act of Congress of October 22, 1913, (28 U. S. C. A., Sec. 47) at the Old Post Office Building in the Borough of Manhattan, City of New York, on the 28th day of June, 1932, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, and then and there show cause before the said court so constituted and convened or so called together why the interlocutory injunction prayed for in said petition should not issue, and it is

[fol. 94] Further ordered that a copy of this order be served upon the Attorney General of the United States, the Interstate Commerce Commission, The Long Island Railroad Company and the Pennsylvania Railroad Company at

least five (5) days before the said 28th day of June, 1932, as by said statute made and provided.

Dated New York, June 8th, 1932.

William Bondy, United States District Judge for the Southern District of New York.

[fol. 95] In United States District Court

In Equity. No. 66367

[Title omitted]

Order to Show Cause—Filed July 5, 1932

Whereas in the above entitled suit it has been made to appear from the verified petition presented to the undersigned, a district judge of the United States for the Southern District of New York, which petition was duly filed in the office of the Clerk of the said court on the 15th day of April, 1932, that petitioners herein may be entitled to an interlocutory injunction suspending and restraining the enforcement, operation and execution of, and setting aside a certain certificate and order made by the Interstate Commerce Commission, dated the 8th day of February, 1932, all as more fully set forth in said petition, it is

Ordered that the respondents herein, the United States of America, Interstate Commerce Commission, The Long Island Railroad Company and the Pennsylvania Railroad Company, appear before the Hon. Augustus N. Hand, United States Circuit Judge for the Second Circuit and the Hon. Robert P. Patterson, United States District Court Judge for the Southern District of New York, and the undersigned, said judges having been called by the undersigned to his assistance to hear and determine said petition in accordance with the provisions of the Act of Congress of October 22, 1913, (28 U. S. C. A., Sec. 47) at the Old Post Office Building in the Borough of Manhattan, City of New York, on the 28th day of June, 1932, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard and then and there show cause before the said court so constituted and convened or so called together why the interlocutory injunction prayed for in said petition should not issue, and it is

[fol. 96] Further ordered that a copy of this order be served upon the Attorney General of the United States, the Interstate Commerce Commission, The Long Island Railroad Company and the Pennsylvania Railroad Company at least five (5) days before the said 28th day of June, 1932, as by said statute made and provided.

Dated New York, June 8th, 1932.

William Bondy, United States District Judge for the Southern District of New York.

[fols. 97 & 97-1] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 66258

TRANSIT COMMISSION, Petitioner,

vs.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, the Pennsylvania Railroad Company, Respondents, and Interstate Commerce Commission, Intervening Respondent

In Equity. No. 66367

THE STATE OF NEW YORK, Petitioner,

vs.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD ROAD COMPANY, the Pennsylvania Railroad Company, Respondents, and Interstate Commerce Commission, Intervening Respondent

Statement of Evidence—Filed Oct. 6, 1932

Before a Statutory Court Composed of Hon. Augustus N. Hand, Hon. William Bondy, and Hon. Robert P. Patterson

New York, June 29, 1932—10.30 a. m.

[fol. 97-2] APPEARANCES

George H. Stover, Esq., Solicitor for Petitioner, Transit Commission; George H. Stover, Esq., and Philip Hodes, Esq. Counsel.

John J. Bennett, Jr., Esq., Solicitor for Petitioner, The State of New York; Wendell P. Brown, Esq., Assistant Attorney General, of Counsel.

George Z. Medalie, Esq., United States Attorney, Solicitor for the United States of America; Elmer B. Collins, Esq., Special Assistant to the Attorney General, of Counsel.

Joseph F. Keany, Esq., Solicitor for Respondents, Long Island Railroad and Pennsylvania Railroad Company; Joseph F. Keany, Esq., and Alfred A. Gardner, Esq., of Counsel.

Daniel W. Knowlton, Esq., Solicitor for Intervening Respondent, Interstate Commerce Commission; H. L. Underwood, Esq., of Counsel.

[fol. 97-3] COLLOQUY

Judge Hand: Who are the parties here?

Mr. Hodes: The Transit Commission and the State of New York are the petitioners. There are two suits here. They are both identical in nature and substance, and the defendants are the Interstate Commerce Commission, the United States of America, the Long Island Railroad and the Pennsylvania Railroad.

Judge Hand: How many counsel—how many different counsel—wish to be heard?

Mr. Hodes: Well, for the Transit Commission and the State of New York I believe I will be the only one. I don't know if Mr. Brown——

Mr. Brown: No, I think the State will be content to rest this case on the arguments of Mr. Hodes.

Judge Hand: For the Transit Commission?

Mr. Hodes: Yes.

Judge Hand: And who desires to be heard on the part of the respondents?

Mr. Gardner: Both railroad companies, of course, and I believe the Department of Justice.

Judge Hand: By different counsel?

Mr. Gardner: No, the railroad companies by one counsel. I represent both railroad companies.

Mr. Collins: I should like to be heard just a few minutes [fol. 97-4] on behalf of the United States.

Mr. Underwood: And I for the Interstate Commerce Commission.

Judge Hand: How much time do you want?

Mr. Hodes: I believe my argument will take about forty-five minutes.

Judge Hand: And on the other side?

Mr. Gardner: The railroad companies I think will finish in twenty minutes or less.

Mr. Collins: I only want ten or fifteen minutes for the United States.

Mr. Underwood: And probably twenty minutes for the Commission.

Judge Hand: Have you got sets of the papers here for the Judges?

Mr. Hodes: Yes, your Honor, I have the petitions of both the Transit Commission and the State of New York. I believe there is nothing in issue in reference to the facts of the case. The question involved here is purely one of law, and I have copies of the pleadings, if your Honor would care to see them.

Judge Hand: But you think they will cut very little figure for the purposes of the argument?

Mr. Hodes: I do not think anything at issue cuts any [fol. 97-5] figure at all. The question involved is purely a legal question.

Mr. Gardner: I have copies of the answers in both suits of the railroad companies, and the petitions in the two suits are identical except for an allegation as to the State. Otherwise with changed numbers the two petitions are identical. As a precaution I have prepared for the Court upon the hearing copies of each of the answers, and merely submit our briefs before the argument.

Judge Hand: Yes. Have you your brief?

Mr. Hodes: Yes (submitting).

Judge Hand: Why is the State a party? Oh, the State is a party in one.

Mr. Hodes: Yes.

Judge Hand: And the Transit Commission in the other. Why is that? Can you just tell us in a word or two?

Mr. Hodes: In order that there should be no question as to the jurisdiction of this Court, the State is made a party.

Judge Hand: I see.

Mr. Gardner: And may I add to that, an explanation of how that arose and clarify things a little. In the case of

[fol. 97-6] an abandonment which was before this Court late last year and went to the Supreme Court of the United States, when the Transit Commission brought their action there was a question in my mind as to whether they were properly here, whether they could do it, and so I raised the point, and immediately they brought the Attorney General in with a petition in behalf of the State, which was entirely agreeable to us as long as we got our final determination from the Supreme Court.

Judge Hand: And there the question went to the Supreme Court?

Mr. Gardner: The question of jurisdiction of the Commerce Commission over an abandonment of the Long Island Railroad Company's Whitestone Branch, yes. The State's question there was almost identical with the question here, so that two suits were brought here as a precaution on their part.

Judge Hand: That was a suit involving the Long Island Railroad?

Mr. Gardner: Yes, and it was before a Statutory Court here first, then it went to Washington, and was decided in January of this year.

Judge Hand: Well, we will proceed.

[fol. 97-7] MOTION TO CONSOLIDATE

Mr. Hodes: If the Court pleases may I move at the outset to consolidate both actions, both the Transit Commission action and the action by the State of New York? And I further believe I am expressing the sentiments of all the parties by requesting that this hearing considered as both interlocutory and final.

These suits were instituted pursuant to the Act of Congress approved October 22, 1913, 28 United States Code Annotated, Section 41, subdivision 28, and Sections 43 to 48 inclusive, to enjoin and set aside and annul an order and certificate of the Interstate Commerce Commission which was issued on February 8, 1932.

The only issue raised in this case is one of law, namely, whether the Interstate Commerce Commission had jurisdiction to issue this certificate, the petitioners denying that

the section of the Act relied upon applies to trackage rights or that it is retroactive in its operation or that the Commission, even assuming that it does have jurisdiction, can dictate the terms and conditions of the agreement between the carriers to the exclusion of the State authorities.

[fol. 97-8] The facts are as follows: The Long Island Railroad Company, ever since 1910——

Judge Hand: Let me ask you this. You are moving for a consolidation and also for a preliminary injunction?

Mr. Hodes: Well, we ask that this be considered as a final injunction also.

Judge Hand: Yes, and you also move for a preliminary injunction?

Mr. Hodes: Yes.

Judge Hand: My impression is that you should do that, in order to preserve the statutory character.

Mr. Hodes: Accordingly, I offer in evidence a certified copy of the record taken before the Interstate Commerce Commission in a case known as Finance Docket 7308. I do not think the Court will have much use for this record, because the facts involved in the case involve only a question of law, but I offer that in evidence in the event that certain portions of it may be needed.

Judge Hand: Let me ask you why you want to consolidate these actions, instead of having them run along together and what basis you have for that motion?

[fols. 97-9–93a] Mr. Hodes: Well, the basis that I have for that is that that was precisely the procedure determined in the Statutory Court in another case, the Whitestone abandonment case. Further, I think it would facilitate an appeal to the United States Supreme Court; instead of having two records, there would be one.

* * * * * * *

[fol. 98] PETITIONER'S EXHIBIT NO. 1

(No. 13 in Stipulation re Record)

Copies are annexed to Record, but not certified as originals are not on file in office of Clerk of U. S. District Court, S. D. N. Y.

[fols. 98a & 98-1] BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

Application of THE PENNSYLVANIA RAILROAD COMPANY, Lessee of the Pennsylvania Tunnel and Terminal Railroad, and THE LONG ISLAND RAILROAD COMPANY, under Paragraph (18) of Section 1 of the Interstate Commerce Act for a Certificate of Public Convenience and Necessity Authorizing the Latter Company to Operate, under Trackage Rights, Over That Portion of the Pennsylvania Tunnel and Terminal Railroad from Near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, to Pennsylvania Station, Borough of Manhattan, City and State of New York, Including the Use of Said Yard and Station and the Facilities and Appurtenances Thereof, and for an Order, under Paragraph (4) of Section 3 of Said Act, Requiring the Use of Said Tracks and Terminal Facilities by The Long Island Railroad Company on Terms and for Compensation Agreed Upon by The Pennsylvania Railroad Company and The Long Island Railroad Company.

[fol. 98-2] To the Honorable the Interstate Commerce Commission:

The Pennsylvania Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and The Long Island Railroad Company, a corporation organized and existing under the laws of the State of New York, respectfully represent to the Commission:

(a) The exact corporate names of the applicants are: "The Pennsylvania Railroad Company," and "The Long Island Railroad Company."

(b) Applicants are carriers by railroad, engaged in the transportation of passengers and property, subject to the Interstate Commerce Act.

(c) This application is for authority to The Long Island Railroad Company to exercise trackage rights over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company, which railroad is leased to The Pennsylvania

Railroad Company, between a point near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, and Pennsylvania Station, Borough of Manhattan, City and State of New York, including the use of said yard and station and the facilities and appurtenances thereof and for an [fol. 98-3] order requiring the use of said tracks and terminal facilities by The Long Island Railroad Company on terms and for compensation agreed upon by The Pennsylvania Railroad Company and *the* The Long Island Railroad Company and is made under paragraph (18) of Section 1 and paragraph (4) of Section 3 of the Interstate Commerce Act.

Present and future public convenience and necessity require and will require the continued operation under trackage rights and the use of said tracks and terminal facilities by The Long Island Railroad Company and such operation and use does not and will not substantially impair the ability of The Pennsylvania Railroad Company to handle its own business.

(d) Pennsylvania Tunnel and Terminal Railroad Company has leased its entire line of railroad and property, extending from the Township of Kearney, Hudson County, New Jersey, to the Borough and County of Queens, New York, to The Pennsylvania Railroad Company under an agreement of lease dated June 14, 1928, for a period of 999 years from July 1, 1928, which was approved by the Commission in Finance Docket No. 6968. The entire Capital Stock of the Pennsylvania Tunnel and Terminal Railroad Company is owned by The Pennsylvania Railroad Company.

(e) The Long Island Railroad Company has been exer- [fol. 98-4] cising trackage rights over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company between Sunnyside Yard, Long Island, and Pennsylvania Station, New York, said Yard and Station and terminal facilities, since 1910, when the Tunnel Company's property was opened for operation. Such rights were granted under short term agreements which were approved, from time to time, by the Transit Commission of the State of New York. However, it is now proposed to grant these trackage rights and terminal facilities on a more permanent basis under a recently executed agreement dated November 13, 1928, ef-

fective July 1, 1928, whereby The Long Island Railroad Company will be granted, subject to the approval of the Commission, said trackage rights and the use of said terminal facilities for a period of twenty years, and thereafter indefinitely, until terminated by six months' prior notice by either Company to the other. Copy of said agreement is attached hereto and marked "Exhibit A."

Practically all of the Capital Stock of The Long Island Railroad Company is owned by The Pennsylvania Railroad Company.

(f) Correspondence with respect to this application should be addressed to A. J. County, Vice-President in charge of Treasury and Accounting Departments and Cor- [fol. 98-5] porate Work; C. B. Heiserman, Vice-President and General Counsel, The Pennsylvania Railroad Company, Broad Street Station, Philadelphia, Pa., or Joseph F. Keany, General Solicitor, The Long Island Railroad Company, Pennsylvania Station, New York, N. Y.

(g) The Pennsylvania Railroad Company was incorporated in April, 1846, under the laws of the Commonwealth of Pennsylvania.

The Long Island Railroad Company was incorporated in 1834 under the laws of the State of New York.

(h) Actions authorizing the execution of the agreement above referred to, and the preparation and filing of this application, were adopted by the Board of Directors of The Pennsylvania Railroad Company at their meeting held in Philadelphia, Pa., on September 26, 1928, and of The Long Island Railroad Company at their meetings held in New York City on April 4 and October 3, 1928.

Certified copies of the said actions are hereto attached, marked, respectively, "Exhibit B," "Exhibit C" and "Exhibit D."

(i) The railroad of the Pennsylvania Tunnel and Terminal Railroad Company extends from the Township of Kearney, Hudson County, State of New Jersey, to the Borough and County of Queens, State of New York, a distance [fol. 98-6] of 12.72 miles, with a branch line extending to Harrison, New Jersey, a distance of 0.96 of a mile, making a total mileage of 13.68 miles of line. Of this mileage, The Long Island Railroad Company is granted trackage rights

over 4.2 miles in the Counties of Queens and New York, all in the City of New York, extending from Harold Avenue, in Sunnyside Yard, Long Island, to Pennsylvania Station.

(j) Applicants do not desire a hearing provided the lack thereof does not act as a deterrent to the granting of the authority and/or the issuing of the order as prayed herein.

[fol. 98-7] Exhibits

There are filed with this application, and as a part thereof, the following exhibits:

(1) Copy of the proposed trackage agreement between the two companies, dated November 13, 1928, hereto attached, marked "Exhibit A."

(2) Resolutions adopted by the Board of Directors of The Pennsylvania Railroad Company, Lessee of the Pennsylvania Tunnel and Terminal Railroad Company, approving the agreement and authorizing the making and filing of this application, hereto attached, marked "Exhibit B."

(3) Resolutions adopted by the Board of Directors of The Long Island Railroad Company approving the agreement and authorizing the making and filing of this application, hereto attached, marked "Exhibit C" and "Exhibit D."

(4) Blueprint showing the line of railroad of the Pennsylvania Tunnel and Terminal Railroad Company between Sunnyside Yard, Long Island, and Pennsylvania Station, New York, over which The Long Island Railroad Company proposes to exercise trackage rights, attached hereto, marked "Exhibit E."

Wherefore said The Pennsylvania Railroad Company, Lessee of the Pennsylvania Tunnel and Terminal Railroad [fol. 98-8] Company, and The Long Island Railroad Company pray that your Honorable Commission may issue a Certificate of Public Convenience and Necessity authorizing The Long Island Railroad Company to operate, under trackage rights, over that portion of the Pennsylvania Tunnel and Terminal Railroad from near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, to Penn-

sylvania Station, Borough of Manhattan, City and State of New York, including the use of said Yard and Station and the facilities and appurtenances thereof and for an order under paragraph (4) of Section 3 of said Act, requiring the use of said tracks and terminal facilities by The Long Island Railroad Company on terms and for compensation agreed upon by The Pennsylvania Railroad Company and The Long Island Railroad Company.

Respectfully submitted.

The Pennsylvania Railroad Company, by A. J. County, Vice-President. The Long Island Railroad Company by G. LeBoutillier, Vice-President.

[fols. 98-9-98b] *Duly sworn to by A. J. County and G. LeBoutillier. Jurats omitted in printing.*

[fols. 98c & 98cc] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

Joint Application of THE PENNSYLVANIA RAILROAD COMPANY, Lessee of the Pennsylvania Tunnel and Terminal Railroad, and THE LONG ISLAND RAILROAD COMPANY, for a Certificate Authorizing the Latter Company to Operate under Trackage Rights Over a Portion of the Pennsylvania Tunnel and Terminal Railroad, etc.

ORDER PERMITTING INTERVENTION—Feb. 12, 1929

Upon consideration of the record in the above entitled proceeding and petition filed on behalf of the Transit Commission of the State of New York for leave to intervene herein;

It is ordered, That the said Transit Commission of the State of New York be, and it is hereby, permitted to intervene and be treated as a party hereto.

It is further ordered, That a copy of the intervening petition and of this order be served upon the applicants and the Governor and Public Service Commission of New York; and that a copy of this order be served upon each of the parties to this proceeding.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[fols. 98d & 98d-1] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

Application of The Pennsylvania Railroad Company, Lessee of the Pennsylvania Tunnel and Terminal Railroad, and The Long Island Railroad Company, under paragraph (18) of Section 1 of the Interstate Commerce Act, for a Certificate of Public Convenience and Necessity authorizing the latter Company to operate, under trackage rights, over that portion of the Pennsylvania Tunnel and Terminal Railroad from near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, to Pennsylvania Station, Borough of Manhattan, City and State of New York, including the use of said Yard and Station and the facilities and appurtenances thereof and for an order under paragraph (4) of Section 3 of said Act, requiring the use of said tracks and terminal facilities by The Long Island Railroad Company on terms and for compensation agreed upon by The Pennsylvania Railroad Company and The Long Island Railroad Company

PETITION FOR LEAVE TO AMEND THE APPLICATION

[fol. 98d-2] The Pennsylvania Railroad Company, and The Long Island Railroad Company, the applicants in the above entitled proceeding, and the Petitioners herein, respectfully represent and show unto the Commission:

1. That through an error in assembling and stating the investment, as set forth in the agreement, bearing date November 13, 1928, a copy of which, marked "Exhibit A" is attached to and made part of the application heretofore filed in the above entitled proceeding, the said investment as set forth in Paragraph (a) of Article Third on page 3 of said agreement (Exhibit A) was incorrectly stated as of January 31, 1928, as follows:

"(1) Pennsylvania Station and yard between Tenth and Sixth Avenues, Borough of Manhattan, New York City	$46,015,031.
"(2) The approaching tunnels and tracks eastward from Sixth Avenue to Harold Avenue, in the Borough of Queens	32,875,309.

"(3) Sunnyside Yard and adjacent facilities in the Borough of Queens ..... 7,694,009."

2. That upon the discovery of the error your Petitioners [fol. 98d-3] caused the same to be corrected and re-executed the agreement as of the same date, to wit: November 13, 1928, and in said re-executed agreement, set forth the correct investment at the same time bringing said corrected investment down to July 1, 1928, to correspond with the date as of which said agreement, by the terms thereof, is to become effective, subject to the approval of the Commission. Said corrected investment as of July 1, 1928, is set forth in Paragraph (a) of Article Third on page 3 of said re-executed agreement, as follows:

"(1) Pennsylvania Station and yard between Tenth and Sixth Avenues, Borough of Manhattan, New York City $46,896,746.94
"(2) The approaching tunnels and tracks eastward from Sixth Avenue to Harold Avenue, in the Borough of Queens 32,605,521.38
"(3) Sunnyside Yard and adjacent facilities in the Borough of Queens ..... 8,623,170.90"

3. A copy of said corrected and re-executed agreement, marked "Exhibit 1," is hereto attached and made part hereof.

4. Your Petitioners also submit, and file with this Petition, fifteen additional copies of said corrected and re-executed agreement.

[fol. 98d-4] Wherefore your Petitioners pray the Commission for leave to amend their said application as heretofore filed in the above entitled proceeding, by withdrawing therefrom the copy of said agreement marked "Exhibit A," which is attached to and made part of said application, and substituting in place thereof said corrected and re-executed agreement, to be marked "Exhibit A," and to be attached to and made part of said application, with like force and effect as though said corrected and re-executed agreement had been marked "Exhibit A," and had been

attached to and made part of said application at the time said application was filed with the Commission.

The Pennsylvania Railroad Company, by A. J. County, Vice-President, Broad Street Station, Philadelphia, Pa. The Long Island Railroad Company, by G. LeBoutillier, Vice-President, Pennsylvania Station, New York City.

[fols. 98d-5 & 98d-6] *Duly sworn to by A. J. County and G. LeBoutillier. Jurats omitted in printing.*

[fol. 98dd] EXHIBIT 1 TO PETITION FOR LEAVE TO AMEND APPLICATION

Agreement Between the Pennsylvania Railroad Company and The Long Island Railroad Company, Dated November 13th, 1928

Granting Trackage Rights to the Long Island R. R. Co. Over the Tracks of the Pennsylvania Tunnel and Terminal Railroad Between Sunnyside Yard, Long Island, and Pennsylvania Station, New York City, Including the Use of Said Yard, Station, and Facilities

[fol. 98dd-1] This agreement made this thirteenth day of November, in the year of our Lord One thousand nine hundred twenty-eight (A. D. 1928) between The Pennsylvania Railroad Company, a Corporation of the State of Pennsylvania, Lessee, in possession of and operating the railroad and properties of Pennsylvania Tunnel and Terminal Railroad Company, party of the first part, and hereinafter designated "Pennsylvania Company" and The Long Island Railroad Company, a Corporation of the State of New York, party of the second part, and hereinafter designated "Long Island Company."

Whereas, by virtue of a certain indenture of lease bearing date the Fourteenth day of June, A. D. 1928 made and executed by Pennsylvania Tunnel and Terminal Railroad Company, as Lessor, and The Pennsylvania Railroad Company, as Lessee, said The Pennsylvania Railroad Company is in possession of and operating the railroad situate in the States of New Jersey and New York extending from a con-

nection with the tracks of the United New Jersey Railroad and Canal Company in the Township of Kearney, County of Hudson, State of New Jersey, about two miles east of the center of Market Street, Newark, in said State of New Jersey, and extending eastwardly—generally through tunnels under the Hudson River, the Borough of Manhattan and the East River—to the Borough and County of Queens, City and State of New York, where it connects with the railroad of The New York Connecting Railroad Company; and a branch known as the Harrison Branch extending from a point on the main line about one-quarter of a mile east of the western end thereof, about one mile to or toward the town of Harrison, County of Hudson, State of New Jersey; together with all of the sidings, tunnels, extensions, branches and all stations, depots, buildings, appurtenances and property of whatsoever kind and wheresoever situate now owned or which may be hereafter acquired by said [fol. 98dd-2] Pennsylvania Tunnel and Terminal Railroad Company;

And whereas said The Long Island Railroad Company desires to acquire the right to use jointly with said The Pennsylvania Railroad Company the railroad tracks, stations and facilities hereinafter mentioned, and The Pennsylvania Railroad Company is willing, upon and subject to the agreements, covenants, terms and conditions hereinafter set forth, to grant such right to The Long Island Railroad Company;

Now, Therefore, This Agreement Witnesseth, That in consideration of the premises and of the payments to be made by the Long Island Company to the Pennsylvania Company as hereinafter provided, and in further consideration of the covenants and agreements hereinafter set forth to be kept and performed by each of the parties hereto, the parties hereby mutually covenant and agree each with the other as follows, to-wit:

First. The Pennsylvania Company, subject to all of the terms, conditions, stipulations, limitations and restrictions contained in the franchise, dated October 9th, 1902, granted to the Pennsylvania, New York and Long Island Railroad Company (one of the constituent Companies of the Pennsylvania Tunnel and Terminal Railroad Company) by the Board of Rapid Transit Railroad Commissioners for the

City of New York, hereby grants to the Long Island Company for and during the term hereinafter specified trackage rights over the following tracks, and the right to use the following facilities and appurtenances for handling its passenger, baggage, mail and express traffic, but subject to the terms, conditions, limitations and restrictions hereinafter set forth: (a) Pennsylvania Station and yard between Tenth and Sixth Avenues, Borough of Manhattan, New York City; (b) the approaching tunnels and tracks eastward from Sixth Avenue to Harold Avenue in the Borough of Queens, where connection is made with the railroad of the Long Island Company; and if and when de- [fol. 98dd-3] sired by the Long Island Company (c) Sunnyside Yard and adjacent facilities in the Borough of Queens.

Second. The Pennsylvania Company will, from time to time, add to said portion of said railroad, Pennsylvania Station, Sunnyside Yard, and facilities and appurtenances, to be used by the Long Island Company hereunder, such additions, betterments and improvements as may be mutually determined between the parties hereto, except that the Pennsylvania Company may make, at any time, without the approval of the said Long Island Company such additions, betterments and improvements as in the judgment of the Directors of the Pennsylvania Company may be required by Federal, State or Municipal enactments or regulations, and also such as may in their judgment be necessary for the protection of the railroad and property covered by this agreement.

Third. The Long Island Company covenants and agrees to use and avail itself of the rights hereby granted, but under and subject to the terms, conditions and stipulations of this agreement, and to pay as rental therefor in each and every month during the continuance of this agreement:

(a) A sum equivalent to such proportion of six per centum (6%) per annum on the investment in said railroad, Pennsylvania Station, Sunnyside Yard and facilities and appurtenances as of July 1st, 1928, as follows:

(1) Pennsylvania Station and yard between Tenth and Sixth Avenues, Borough of Manhattan, New York City $46,896,746.94

(2) The approaching tunnels and tracks eastward from Sixth Avenue to Harold Avenue, in the Borough of Queens	32,605,521.38
(3) Sunnyside Yard and adjacent facilities in the Borough of Queens	8,623,170.90

[fol. 98dd-4] and a like percentage on the cost of all additions, extensions, improvements and betterments thereto, as the number of its cars and engines thereon, therein and thereover in each month shall bear to the total number of cars and engines thereon, therein and thereover during such month, each engine to be counted as three cars; such investment in additions, extensions, improvements and betterments, however, not to be in excess of the cost thereof; and

(b) A sum equivalent to such proportion of the cost and expense of operation, maintenance and renewals on said portion of railroad, Pennsylvania Station, Sunnyside Yard, and facilities and appurtenances, and all additions, extensions, improvements and betterments thereto, as the number of its cars and engines thereon, therein and thereover in each month shall bear to the total number of cars and engines thereon, therein and thereover during such month—each engine to be counted as three cars. Taxes, rents and easements, cost of insurance, cost of lighting tracks and track crossings, and watchmen's wages, together with any and all expenditures required by Federal, State or Municipal enactments or regulations, shall be included in the expenses of maintenance and operation, and there shall be deducted therefrom receipts received on account of station privileges, concessions and other non-transportation sources.

Switching movements between Pennsylvania Station and Sunnyside Yard, with the exception of movements of engines and cars necessary for the arrangement or makeup of trains in said station or in said yard, shall be included in the above computations.

The insurance designated and specified in paragraph (b) as above, does not and shall not include any charge for the insurance of rolling stock against fire loss, but the latter must be borne and paid by the Company owning such rolling stock, or using the same in its service.

Fourth. All engines and cars shall be propelled and operated by electricity and in such system and manner as the Pennsylvania Company shall approve. The Pennsylvania [fol. 98dd-5] Company covenants and agrees to furnish the necessary distributing system and supply the current from their power house to contact shoes on the equipment of the Long Island Company—said distributing system to embrace the necessary transmission lines, sub-stations, storage batteries, working conductors and appurtenances thereof—proper and necessary to enable the Long Island Company to move its trains on the portion of the said railroad over which it is hereby granted trackage rights, and in said Pennsylvania Station and Sunnyside Yard, and for the supply of such current, and the distributing system and service connected therewith, the Long Island Company shall, and hereby covenants and agrees to, pay therefor, in each and every month during the continuance of this agreement, to the Pennsylvania Company such proportion of the several items in this Article hereinafter mentioned as the number of its cars and engines thereon, therein and thereover in each month shall bear to the total number of cars and engines thereon, therein and thereover during such month—each engine to be counted as three cars.

(a) Interest at the rate of six per centum (6%) on the value to be agreed upon between the parties hereto, for the purposes of this agreement, of such distributing system and of all its ramifications and appurtenances, including the power house.

(b) Interest at the rate of six per centum (6%) on the agreed cost of all additions, extensions, improvements and betterments which may from time to time hereafter be made to said distributing system and to all its ramifications and appurtenances, including the power house; and

(c) That proportion of the operating expenses, including taxes, rents and easements, insurance, replacements and depreciation, and expenditures imposed by Federal, State or Municipal enactments or regulations, incurred by the Pennsylvania Company in generating and transmitting the electric current to contact shoes on the equipment of the Long Island Company; less receipts from current fur- [fol. 98dd-6] nished to the Long Island Company for purposes other than handling its trains over the portion of the

said railroad and in the said Pennsylvania Station and Sunnyside Yard, and similar receipts from current that may be furnished to other parties for purposes other than the propulsion of trains.

Fifth. At the end of the period of five years from and after the date this agreement takes effect, and at the end of any succeeding period of five years during the term hereof, either party hereto may, by giving not less than sixty days' previous notice in writing to the other party, seek a modification in the rate of interest rentals or in the bases upon which such interest rentals are computed, and in the event the parties are unable to agree in respect of any such proposed modification the question shall be submitted to arbitrators in the manner hereinafter provided for in paragraph Eleventh hereof, and the decision of the arbitrators or a majority of them shall be final and conclusive and binding upon the parties hereto.

Sixth. The bills against the Long Island Company for the rental and expenses prescribed by Articles Third and Fourth shall be rendered not later than the twentieth day of each month for the business of the preceding month, and payment thereof, without abatement, shall be made not later than the last day of each calendar month in which the bill is rendered. If any question or dispute shall arise as to any such bills, either Company shall have the right to examine the books and records of the other to verify the settlement required to be made thereunder, but such dispute shall not delay the payment of bills as rendered, and any adjustment necessary by reason thereof shall be made in the accounts of subsequent months.

Seventh. If the Long Island Company, its successors or assigns, shall make default in whole or in part, in any payment prescribed and required by this agreement for the space of ninety days, or shall make default in the performance of any covenant or obligation herein contained [fol. 98dd-7] or hereby imposed upon it for the space of ninety days after the service upon it of written notice of such default, then and in either such case, at the option of the Pennsylvania Company, all rights and privileges conferred by this agreement on the Long Island Company shall cease, terminate and be absolutely extinguished; provided, however, that such termination shall not affect the right of

said Pennsylvania Company to enforce payment, by legal process, of money then due and unpaid by it, with interest upon all deferred or delayed payments at the rate of five per centum (5%) per annum.

Eighth. The Pennsylvania Company shall provide for the movement over said portion of the railroad of such trains as the Long Island Company shall desire to move under this agreement and as nearly in accordance with the wishes of the Long Island Company as the same can be done without unreasonably interfering with its own trains of the same class, and shall, if necessary, place such trains of the Long Island Company upon its schedules, and in arranging schedules the Pennsylvania Company shall not discriminate against the trains of the Long Island Company, but shall give them equal rights with its own trains of the same class.

The trains, engines and employes of the Long Island Company, while upon the railroad of the Pennsylvania Company shall be subject to the regulations and orders of the Superintendent or other proper officer of that Company; and to secure uniformity in time, rules and signals, the Long Island Company agrees to adopt and use on said line of railroad the standard time, train rules and signals that may be in use from time to time by the Pennsylvania Company

Ninth. The trackage rights over, and the use of said railroad, Pennsylvania Station and Sunnyside Yard, and the facilities and appurtenances thereof, hereby granted to the Long Island Company, are so granted with the understanding and upon the express condition that the Long Island Company shall assume all risks and liabilities for injury, [fol. 98dd-8] loss or damage to its own trains, engines, cars and property in its charge, its passengers and employes, and also to all other persons and property, including the Pennsylvania Company, injured or damaged by, about, or incident to the operation of its trains, business or traffic from any cause whatsoever, and said Long Island Company hereby expressly covenants and agrees to protect, indemnify and save harmless the Pennsylvania Company against any and all loss, claims or demands in consequence of, or growing out of, such injury, loss or damage, however arising or occurring.

Where, however, loss or damage to their property is sustained by the parties hereto through their joint negligence, then the Pennsylvania Company and the Long Island Company, respectively, shall bear their own loss, but loss or damage sustained by third persons—other than passengers and employes of the Long Island Company, and the persons and property described and defined in the preceding paragraphs of this Article—by such joint negligence shall be borne equally by the Pennsylvania Company and the Long Island Company. If any other claims, loss of damage arise, the same shall be considered and charged as part of the cost of maintenance and operation and included in the monthly accounts thereof and apportioned between the parties hereto as provided in Articles Third and Fourth with respect to expenses of maintenance and operation.

Superintendents, managers, agents, telegraph operators, train dispatchers, section foremen, or laborers, watchmen, switchmen, or any other persons subordinate to the President employed in, or charged with, the maintenance or care of or operation of the property aforesaid shall in respect to the liability of the parties using said railroad, Pennsylvania Station and Sunnyside Yard, facilities and appurtenances, to each other or to third persons, growing out of the fault or neglect of such officers, agents, or employes, be deemed and held to be the sole servants of that party to, or upon or in connection with, whose trains, business, traffic, [fol. 98dd-9] or property any loss or damage may have occurred. Any employe below the rank of Superintendent of either of the parties to this agreement, shall at any time be removed from service, on, or in connection with, the railroad and property mentioned herein, upon complaint, in writing, addressed to the General Manager of the party employing the individual complained of by the General Manager of the other party; but such removal shall not prevent the employment elsewhere of the individual so removed.

Tenth. The Long Island Company agrees that it will not use the said railroad, Pennsylvania Station, Sunnyside Yard and their facilities and appurtenances for the accommodation of any passenger, baggage, mail express, or other traffic handled in passenger trains, which, or in such manner as may injuriously affect the interests of the

Pennsylvania Company; nor will it at any time sell, assign or in any manner transfer or underlet all or any part of the rights and privileges by this agreement secured to it, without the consent in writing of the said Pennsylvania Company; it being understood that the Long Island Company shall not by any practice or device use, or permit others to use, the said railroad, Pennsylvania Station, Sunnyside Yard, and the facilities and appurtenances of the Pennsylvania Company, under any conditions, whether resulting from consolidations, transfers of ownership, construction of new lines or extension of existing lines or otherwise, if such conditions have the effect of violating the provisions or intent of this Article.

In the event that in the judgment of the Pennsylvania Company, the Long Island Company shall at any time violate the intent or any of the provisions of this Article, such violation, upon notice from said Pennsylvania Company, shall be immediately discontinued, and if continued or controverted, the question shall be submitted for arbitration in the manner hereinafter in this agreement provided, and the judgment of the arbitrators in respect to the practice complained of shall be considered to have the effect of, and shall be enforceable as a specific covenant of this agreement.

[fol. 98dd-10] Eleventh. In case of any difference of dispute arising under this agreement, the parties hereto agree to submit the same to two arbitrators, one of whom shall be appointed by the Pennsylvania Company and the other by the Long Island Company, and if these arbitrators cannot agree they shall select a third disinterested and competent person, and their decision, or that of a majority of them, shall be final and conclusive between the parties hereto. In case either of the said Companies shall fail to appoint an arbitrator as aforesaid, for the period of twenty (20) days after written notice given by the other Company to make such appointment, then and in that event the arbitrator appointed by the Company not in default shall appoint an arbitrator of like experience and skill for the defaulting Company, and the said two arbitrators so appointed shall select a third arbitrator, and the three so chosen shall hear and decide such differences, and their decision, or that of a majority of them, shall be final and conclusive upon the parties to this agreement.

Twelfth. Subject to the approval of the Interstate Commerce Commission, the rights and privileges hereby granted to the Long Island Company by the Pennsylvania Company shall be effective and exercisable as of the first day of July, 1928, and shall continue in full force and effect for the term of twenty (20) years from said date, and thereafter from year to year unless terminated either at the end of said twenty (20) year period or at the end of any subsequent year by six months' prior notice in writing by either the Long Island Company or the Pennsylvania Company to the other, when each and every right and privilege conferred under this agreement shall accordingly cease and terminate.

Any agreement or arrangement heretofore existing providing for the use by the Long Island Company of any of the tracks, station, yards, facilities and appurtenances covered by this agreement shall be in all things superseded by this agreement as of July 1, 1928.

[fol. 98dd-11] In Witness Whereof, the said parties have caused their respective corporate seals, duly attested, to be hereunto affixed the day and year hereinabove written.

The Pennsylvania Railroad Company, Lessee, by A. J. County, Vice-President. Attest: Lewis Neilson, Secretary. (Seal.) The Long Island Railroad Company by G. LeBoutillier, Vice-President. Attest: Eugene Wright, Secretary. (Seal.)

[fols. 98e & 98e-1] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

Application of THE PENNSYLVANIA RAILROAD COMPANY, Lessee of the Pennsylvania Tunnel and Terminal Railroad, and THE LONG ISLAND RAILROAD COMPANY, under Paragraph (18) of Section 1 of the Interstate Commerce Act, for a certificate of Public Convenience and Necessity Authorizing the Latter Company to Operate, under Trackage Rights, Over that Portion of The Pennsylvania Tunnel and Terminal Railroad from near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, to

Pennsylvania Station, Borough of Manhattan, City and State of New York, Including the Use of said Yard and Station and the Facilities and Appurtenances Thereof, and for an Order, under Paragraph (4) of Section 3 of said Act, Requiring the Use of said Tracks and Terminal Facilities by the Long Island Railroad Company on Terms and for Compensation Agreed Upon by the Pennsylvania Railroad Company and the Long Island Railroad Company

Statement of Evidence

New York City,
July 2, 1929—2:10 o'clock p. m.

Before Thomas F. Sullivan, Examiner

Met pursuant to notice.

APPEARANCES

Alfred A. Gardner, D. P. Williams, and Joseph F. Keany, Pennsylvania Station, New York City, appearing for applicants.

[fols. 98e-2 & 98e-3] Maurice Hotchner, Pennsylvania Bldg., 225 W. 34th street, New York City, appearing Association for Long Island Commuters, Inc.

M. Maldwin Fertig and Harry Hertzoff, Municipal Building, New York City, appearing for the City of New York.

[fols. 98e-4] Proceedings

Exam. Sullivan: We will now proceed with the hearing in Finance Document No. 7308, under which is recorded the application of the Pennsylvania Railroad Company, lessee of the Pennsylvania Tunnel & Terminal Railroad, and the Long Island Railroad Company, under paragraph 18 of section 1 of the interstate commerce act, for a certificate of public convenience and necessity, authorizing the latter company to operate, under trackage rights, over that portion of the Pennsylvania Tunnel & Terminal Railroad from near Harold avenue, in Sunnyside Yard, Borough of Queens, Long Island, to Pennsylvania Station, Borough of Manhattan, City and State of New York, including the use of said yard and station and the facilities and appurtenances thereof, and for an order under paragraph 4 of section 3 of

said Act, requiring the use of said tracks and terminal facilities by the Long Island Railroad Company on terms and for compensation agreed upon by the Pennsylvania Railroad Company and the Long Island Railroad Company.

Petitions of intervention have been filed in this proceeding by the Transit Commission of the State of New York, by the City of New York, and by the Association for Long Island Commuters.

Who appears for the applicants?

Mr. Gardner: We have filed our appearance, Alfred A. Gardner, D. P. Williams and Joseph F. Keany, for the applicants.

[fol. 98e-5] I will ask for a proposed report herein.

Exam. Sullivan: We will take that up in a moment.

Who appears for the various interveners?

Mr. Stover: George H. Stover, counsel, for the Transit Commission, appearing in behalf of the Transit Commission.

Mr. Hertzoff: M. Maldwin Fertig and Harry Hartzoff, and we may have somebody else later, probably will, for the City of New York.

Mr. Hotchner: On behalf of the Association for Long Island Commuters, Maurice Hotchner.

Exam. Sullivan: You may proceed, Mr. Gardner.

Mr. Gardner: I will now ask for a proposed report, and I will dispense with the formal opening and call Mr. Rawson.

Exam. Sullivan: I suggest you call your first witness. As far as the question of proposed report is concerned, it is a matter within the discretion of the Commission, and your request will be given consideration in connection with the handling of the case.

Hobart Rawson was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Gardner:

Q. You are an engineer, are you not?
A. Yes sir.
Q. You have been with the Long Island since 1905?
A. Yes, I came with the Long Island in 1905.

[fol. 98e-6] Q. You are familiar with the trackage and properties covered by the proposed agreement?

A. I am.

Q. Your duties have had to do with the joint facility accounts from 1910 on?

A. Yes, they have.

Q. The terminal property covered by the contract comprises the Pennsylvania station, yards below the surface under and adjacent to the station, tunnels under Manhattan Island, the East River, Borough of Queens, and the yard in the Borough of Queens known as the Sunnyside Yard?

A. Yes, it does.

Q. Have you a map showing the portion of the Pennsylvania Tunnel & Terminal properties covered by the proposed agreement?

A. Yes sir, there is one there.

Mr. Stover: As appears from the notice of intervention served by the Transit Commission, the question of jurisdiction in this case is attacked. Would this be the appropriate time to make a formal motion to dismiss?

Mr. Gardner: Cannot we reserve all questions of jurisdiction?

Exam. Sullivan: Any time really would be appropriate, but I suggest we finish up with this witness first, so that it won't appear in the testimony of one of the witneses.

[fol. 98e-7] Mr. Hotchner: That reservation applies also to the City of New York and to the Commuters?

Exam. Sullivan: Yes sir.

Mr. Hotchner: The question of raising jurisdiction can be made any time later, with the same force and effect as if made before Mr. Rawson came on or during his testimony?

Exam. Sullivan: That will be understood.

By Mr. Gardner:

Q. These maps are in three sections, are they not?

A. Yes sir.

Q. I ask you which section is this that I hand you?

A. This is the section that extends from Manhattan Transfer to the westerly portal of the tunnel under the Hudson River, to what is known as North Bergen, N. J.

Mr. Gardner: I offer it in evidence.

Exam. Sullivan: Is my understanding correct, that this is one map in three sections?

Mr. Gardner: The map that has been marked is the first of three sections.

Exam. Sullivan: That map will be received as exhibit No. 1, and marked.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 1, Witness Rawson," and is forwarded herewith.)

By Mr. Gardner:

Q. What is this map I hand you?

[fol. 98e-8] A. This is the second section, showing the Pennsylvania Tunnel & Terminal property from the west portal of the Hudson River tunnels at North Bergen, N. J. to and through the Pennsylvania station in the Borough of Manhattan, N. Y. and extending thence east to the east portal of the tunnel in Long Island City, Borough of Queens.

Exam. Sullivan: The map will be received as exhibit No. 2, and marked.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 2, Witness Rawson," and is forwarded herewith.)

Q. What is the map I now hand you?

A. The third map shows in light dash lines the property of the Pennsylvania Tunnel & Terminal Company from the waterfront at Long Island City, easterly to the easterly limits of the property at Woodside avenue, including the Sunnyside Yard.

Mr. Gardner: I offer that in evidence.

Exam. Sullivan: It will be received and marked as exhibit No. 3.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 3, Witness Rawson," and is forwarded herewith.)

Q. What is the map I now hand you?

A. That is a map of the Long Island Railroad System. It is colored to show the electrified lines in red, and the line [fol. 98e-9] operated by steam and not electrified in yellow.

This map also shows in green, the line of the Pennsylvania Tunnel & Terminal Railroad Company used by the Long Island Railroad.

Exam. Sullivan: The map will be received and marked as exhibit No. 4.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 4, Witness Rawson," and is forwarded herewith.)

Q. These same terminal properties of the Pennsylvania Tunnel & Terminal Railroad Company have been used by the Long Island under successive trackage agreements since 1910, have they not?

A. Yes, they have.

Q. Prior to 1910, where did the Long Island have a terminal?

A. The principal terminal of the Long Island, prior to 1910, was at the waterfront in Long Island City, and they also operated a ferry service from that point to the foot of 34th street, East River, Manhattan. There was also another terminal of the Long Island, which still is being used, at Flatbush avenue, Brooklyn.

Exam. Sullivan: Was the station at the foot of East 34th street, a ferry slip?

The Witness: That was a ferry slip.

By Mr. Gardner:

Q. How do the passengers from the Flatbush avenue [fol. 98e-10] terminal reach Manhattan?

A. Passengers from Flatbush avenue terminal reach Manhattan by one of the Rapid Transit routes, through a tunnel under the East River.

Q. From Long Island City was there more than one ferry?

A. There was some years before the opening of the Pennsylvania station, the Long Island had a ferry to what was known as Jane Slip, and the East River, near the terminus of the Brooklyn Bridge. Also they ran what they called an annex boat, a small steamer to Pier 8, East River, at the foot of Wall street.

Q. The ferry from Long Island City to 34th street, the last of the three ferries, was discontinued when?

A. About two years ago.

Q. There is still a passenger terminal at Long Island City?

A. There is still a passenger terminal at Long Island City, yes, but used by very few passengers.

Q. Could the traffic into Manhattan be handled by headway service?

A. No, I don't think it could.

Q. Why not?

A. The Long Island operates service—that is, local service and express service to various terminii in the eastern parts of Long Island. For example, there is a line from the Pennsylvania station—rather, a service from the Penn- [fol. 98e-11] sylvania station to Rockaway Beach; another one to Far Rockaway; another to Long Beach; another to Babylon, and to Patchogue, out to Montauk. In the center of the Island they run from the Pennsylvania station through Jamaica to Queens Village, Floral Park, Hempstead, Mineola, and around by the West Hempstead branch to Valley Stream, then to Oyster Bay, Oyster Bay branch, to Wading River on the Wading River branch, and to Greenport, the terminus of the main line at the eastern end of Long Island.

Q. There are some 10 branches, are there not?

A. At least that.

Q. They are shown on the last map?

A. Shown on the last map.

Q. The Long Island has a considerable commuting business, has it not?

A. Very large commuting business.

Q. That has to be brought in from the east in the morning and sent out to the east in the evening?

A. It does.

Q. And has to be served with scheduled trains, of course?

A. Yes, it would be very difficult, if not impossible, to weave the trains in from the different branches into the terminal, if they were not run on a definite, regular schedule.

Q. And the number of these branches contraverge at Jamaica, do they not?

[fol. 98e-12] A. Yes sir.

Q. In order to take care of the service going out at night, trains have to be—have to leave on schedule time from specified tracks, do they not?

A. Yes, they do.

Q. This terminal is not—the terminal and terminal approaches are not used for freight, are they?

A. Only in case of emergency of some kind. They have been used from time to time when emergency required,—when the water service around the harbor was congested.

Q. Such as?

A. But that is not regular—such as the time of the harbor strike, and one time during the war, I think it was, when they had very severe weather and things were tied up, they brought some coal through the tunnels.

Q. Are you familiar with the successive agreements under which since 1910 the Long Island has operated into the terminal?

A. Yes, I am.

Q. You are familiar with the joint facility accounts under the successive agreements by which payments were made?

A. Yes.

Q. Have you a schedule, showing the successive agreements, with a brief statement under each?

A. Yes, I have prepared such a schedule.

Q. You have copies of those agreements, have you?

[fol. 98c-13] A. Yes sir.

Q. I hand you—is that the schedule and are those the agreements?

A. That is the schedule and the various agreements. The schedule gives each agreement in succession, with the date when it was effected.

Q. That is a summary for convenient reference, is it not?

A. Yes.

Mr. Gardner: I will offer the summary and the agreements, and suggest possibly it might be well to mark them as a single exhibit.

Exam. Sullivan: These papers, consisting of five documents, will be received as exhibit No. 5.

(The same were thereupon received in evidence, marked "Applicants' Exhibit No. 5, Witness Rawson," and are forwarded herewith.)

Q. Have you a statement, showing the amounts paid by the Long Island, each year, under these successive agreements?

A. Yes sir, I have.
Q. Will you produce it?
A. There is the statement.

Mr. Gardner: I offer that in evidence.
Exam. Sullivan: The statement will be received as exhibit No. 6.

(The same was thereupon received in evidence, marked [fol. 98e-14] "Applicants' Exhibit No. 6, Witness Rawson," and is forwarded herewith.)

By Mr. Gardner:

Q. In making the payments under these successive agreements, there was a variation from the terms of the first agreement, was there?

A. Yes sir.

Q. Will you explain that, and then will you explain the changes under the successive agreements, briefly?

A. The first agreement, which was dated September 24, 1910, provided that the operating expenses, taxes and interest on investment, should be divided between the Long Island and the Pennsylvania on a wheelage basis. It was found that this would require the payment of a very large sum by the Long Island, and the terms of the agreement were, therefore, not carried out in the earlier stages of the operation into the station. The operating expenses were divided on a wheelage basis, in accordance with the terms of that agreement, but instead of the proportion of taxes and proportion of interest on investment, a fixed sum of $300,000 a year was paid by the Long Island. That continued from September 24, 1910 until July 1, 1912, when the second agreement was made.

Q. And then what was the next change?

A. Under this escond agreement, the expenses and taxes were divided on a wheelage basis; also the credits from concessions, and a fixed payment of $156,000 a year was made by the Long Island to the Pennsylvania as part of the [fol. 98e-15] interest on the investment, or what we know as fixed rental. This arrangement continued until July 1, 1920, when another change was made, the fixed rental being increased to $20,000 a month, or $240,000 a year.

The division of the other expenses, taxes, et cetera, remained as before.

On July 1, 1922, and continuing to July 1, 1923, the rental was further increased to $25,000 a month, or $300,000 a year.

Then in July, 1923——

Q. Well, the expenses and taxes continued——

A. The expenses and taxes continued on a wheelage basis.

On July 1, 1923, the present agreement was made effective. That was not actually consummated until July 28, 1925, but the payments under it were made retroactive until July 1, 1923.

Under that agreement, which is the agreement under which we are now operating, the expenses of the station proper—that is, maintenance and operation at the track level, were divided on a wheelage basis; the expenses above the track level were all paid by the Pennsylvania. In doing that, an arbitrary division was made, in which we said that the charges to accounts, repairs to stations and office buildings, station employes and station supplies and expenses, should be considered as the expenses of the station above the track level, and the Long Island did not share in those expenses. Similarly the taxes on all the property, except [fol. 98e-16] the station above the track level, and one half of the service plant were divided on a wheelage basis, and as fixed rental a return of four per cent on the investment in the property, excluding everything above the track level was divided on a wheelage basis.

The interest on the proportion of the power facilities used by the Long Island, was also divided on a wheelage basis. This interest rate was 4½ per cent, however, instead of four per cent. That 4½ per cent interest rate on the power facilities had been included in the prior agreements.

Q. Have you a statement, showing the number of Long Island passengers using the terminal, 1911 to date; also the passengers of other railroads?

A. Yes sir.

Q. Is this it?

A. That is the statement.

Mr. Gardner: I will offer it in evidence.

Exam. Sullivan: The statement will be received as exhibit No. 7.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 7, Witness Rawson," and is forwarded herewith.)

Q. Have you a statement, showing the cars, 1911 to date, of the Long Island and other railroads using the terminal?

A. Yes, that is the statement showing the cars in and out of the Pennsylvania station, 1911 to 1928. In this state-
[fol. 98e-17] ment the locomotives are counted as three cars, which is the basis used in dividing the expenses.

Exam. Sullivan: The statement will be received as exhibit No. 8.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 8, Witness Rawson," and is forwarded herewith.)

Q. Are you familiar with the operation of the Long Island trains, as well as the trains of the other companies over the trackage in the terminal covered by the proposed agreement?

A. Yes, I am.

Q. Has this operation been generally speaking, apart from the changes resulting from increased traffic, the same throughout the period since September, 1910, when operation commenced?

A. It has, yes.

Q. The Long Island operation commenced before the Pennsylvania by a few weeks?

A. Yes, the Long Island operation commenced September 8, 1910, and the Pennsylvania, I think it was November 30, 1910.

Q. The Lehigh Valley and the Baltimore & Ohio came into the terminal during Federal control, did they not?

A. Yes, they did.

Q. The Baltimore & Ohio ceased to operate into the terminal August 29, 1926?

[fol. 98e-18] A. Yes.

Q. The Lehigh Valley still operates into the terminal?

A. Yes.

Q. The New Haven still operates?

A. Yes, the New Haven came in in 1917 from the east and still continues to operate.

Exam. Sullivan: This last statement you have put in, exhibit No. 8, does not include the cars of the Lehigh Valley or New Haven?

The Witness: Yes, cars of the Lehigh Valley, the New Haven and Baltimore & Ohio are included there as Pennsylvania cars. That shows the comparison between the Long Island and all others, showing the ratio, you see, that the Long Island pays, the percentage of the terminal expenses. The Long Island as such is not interested in the cars of the other railroads. That is divided between the railroads.

Q. Will you describe, Mr. Rawson, how the trains of the various companies are operated, making the description general, but so that then you may describe the method of counting the cars?

A. The trains of the Long Island for the most part, operating into the Pennsylvania station, consist of a number of cars on which there are individual motors. That is, they are what we call multiple unit trains. There is no locomotive hauling the train, but a certain proportion of the cars have motors on them which act as the propelling [fol. 98e-19] force of the train. There are a few Long Island trains which are handled into the terminal by electric locomotives.

Exam. Sullivan: On those multiple unit trains, you don't consider them as a locomotive?

The Witness: No.

Exam. Sullivan: No allowance made for the locomotive?

The Witness: No allowance made for the locomotive. That is a multiple unit car is counted the same as another car. All of the Long Island trains coming into the terminal from the east from the Long Island end of the terminal and into the station; there some of them are switched to the yard at the western end of the station area, and brought back into the terminal to go out in revenue movement as eastbound trains. There are during the morning and evening a certain number of Long Island cars which must be run to points on Long Island for storage, because there is not sufficient storage space in the Pennsylvania station to

take care of those, but it is only a small proportion of the total. In the case of the Pennsylvania Railroad and the Lehigh Valley Railroad, both of which come into the terminal from the west, the trains consist of coaches, Pullman cars, express cars, et cetera, hauled by locomotives. These trains come into the station from the west, discharge their passengers and are then moved to Sunnyside Yard on Long Island for storage, cleaning, et cetera, in preparation for [fol. 98e-20] a return journey.

Therefore, each Pennsylvania train which is brought into the station makes what we would say four movements in and out of the station, once when it comes in from the west, a second time when it goes out to the Sunnyside Yard for storage, a third time when it is brought back to the station from the Sunnyside Yard for a train going to the west, and the fourth time when it is moved to the west as a revenue train. On the other hand, for the majority of the Long Island trains, they only make two movements for each round trip into the station. That is the train comes in from the east with passengers into the station, is switched there or sometimes simply is turned at the platform, and then moves out again to the east, those cars being counted only twice for the round trip, whereas the cars on the Pennsylvania and Lehigh Valley trains are counted four times for the round trip. In that way the Long Island receives quite a material benefit in the method of counting cars, in that its revenue movements are only counted once or twice for the round trip, whereas the Pennsylvania are counted twice or four times for the round trip.

Q. This method of counting cars has been used since the operation of the Long Island at the terminal commenced, has it not?

A. Yes, the same method has been used. One thing I should have mentioned before: The Long Island trains are usually multiple unit trains, and each car is counted only [fol. 98e-21] once. That is, on 11 cars—an 11 car train will be counted as 11 cars, whereas on the Pennsylvania trains being handled by electric locomotives, an 11 car train and a locomotive, would be counted as 14 cars. That is a further advantage that the Long Island enjoys in this method of car counting.

Q. When you say Pennsylvania cars in this description, you mean cars of all the other companies?

A. Yes.

Q. Because they are counted for this purpose as Pennsylvania cars?

A. They are, yes sir. The Long Island comparison is made with the cars of all the companies.

Q. This method was applied to the maintenance and operating joint facility account from 1910 on and also to the return on investment after the trackage agreement to change from the flat rental to the wheelage basis, was it not?

A. Yes, it was.

Q. Have you maps showing the floor plan and the layout of the terminal station above the track level?

A. Yes.

Q. How many sheets are there?

A. There are six sheets of these floor plans, showing the various levels of the Pennsylvania station proper, one level on each sheet, and in order to assist in the identification of what is on each floor, it has been outlined in red. That is, [fol. 98e-22] the plan will show, for instance, I have the top floor here, roofing over train shed, upper part of concourse, but what is actually on the floor level is shown outlined in red in each case.

Q. There are six sheets?

A. Yes.

Exam. Sullivan: The set of maps, described, fastened together with a staple, will be received as exhibit No. 9, and so marked.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 9, Witness Rawson," and is forwarded herewith.)

Q. The Long Island passengers, Mr. Rawson, use all parts of the station, do they not?

A. Yes, they do.

Q. Will you describe in some detail, making reference as far as necessary to the exhibits last offered, how they use the various parts of the station?

A. The plan here which is marked as D-46395, shows the exit concourse level of the Pennsylvania station. This is the level to which—directly above the platform level, and to which those passengers from the incoming trains mount by stairways from the platform.

Exam. Sullivan: What do you mean by the platform level—the track level?

[fol. 98e-23] The Witness: The platform level or the track level, yes, that is the same. In addition, on this level the Long Island departure concourse is located. That is in the northeast corner of the building, adjacent to 33rd street and 7th avenue. Here ticket office, waiting room and concourse are maintained for the Long Island passengers. All the Long Island trains depart from platforms which are reached by stairways leading from this Long Island Concourse, with the exception of race trains during the racing season, and occasionally special trains which depart from the Pennsylvania concourse on the level above and nearer to Eighth Avenue. Nearer to 8th avenue there is an exit concourse where passengers from the Pennsylvania trains and from many Long Island trains come up from the platform and pass through this concourse, over up into other parts of the station, to the cab stand which is on the level above, on the 33rd street side, or passing through the Long Island concourse, or through the exit way to 32nd street, to the 7th avenue subway.

A connection is also now being made to the 8th avenue subway, near the corner of 8th avenue and 33rd street. From this level there are now every morning some 16 trains—Long Island trains which are brought in on tracks adjacent to platforms Nos. 3, 4 and 5, and which pass up the exit stairways to the exit concourse, and from there find their way through various parts of the building to the street, [fol. 98e-24] or to the subway, or to the cabs.

The next sheet above this, shows the next level, which is the main Pennsylvania departure concourse near 8th avenue, and the large waiting room in the center of the building, with ticket offices and smaller writing rooms, and various other facilities, and further east towards 7th avenue the baggage room.

On the north side towards 33rd street, the bottom of the cab ramp is on this level. Practically all incoming passengers, both the Long Island and the Pennsylvania, take cabs at this ramp.

On the 31st street side there is another ramp used principally for incoming Pennsylvania passengers. The Long Island passengers who come in on the tracks near the center of the station, many of them come up to this main concourse,

and through the general waiting room and arcade and all out to 7th avenue.

The next plan shows the arcade leading to 7th avenue. That is the plan at the street level, with the stores on either side.

Near the center of the building, the lunch room towards 33rd street, the restaurant towards 31st street, and then in the back various offices, and so forth.

The other three plans simply show the various offices which are in the corridors around the four sides of the building—the four street sides.

[fol. 98e-25] By Mr. Gardner:

Q. Did you make any reference to tracks 5, 6, 8 and 9?

A. Yes, I guess I called—spoke of platform numbers, instead of track numbers, where the Long Island trains come in in the morning.

Q. You said some 16 trains?

A. Some 16 trains, yes.

Q. Carrying how many passengers?

A. About 13,000 passengers.

Q. During the racing season, are there special race trains?

A. During the racing season there are special race trains operating from four to 10 a day, all of which depart from the—that is, the passengers for these race trains depart from the Pennsylvania station concourse, using the platforms towards the north end of that concourse.

Q. And the racing season extends from about the 1st of May to the end of October?

A. Yes.

Q. Have you a map, showing the track layout in the terminal zone?

A. Yes.

Mr. Gardner: I offer the map.

Exam. Sullivan: It will be received as exhibit No. 10, and so marked.

(The same was thereupon received in evidence, marked [fol. 98e-26] "Applicants' Exhibit No. 10, Witness Rawson," and is forwarded herewith.)

Q. Have you a schedule showing for a typical day the number of trains of the Pennsylvania and Long Island using each station track?

A. Yes, this schedule shows the number of Long Island and Pennsylvania Railroad trains, including other tenant railroads with the Pennsylvania for the 24 hour period, 6:00 A. M. March 20th to 6:00 A. M. March 21, 1929.

It also shows the number of cars and the time in which the trains occupied each of the tracks.

Mr. Gardner: I offer that in evidence.

Exam. Sullivan: The statement will be received and marked exhibit 11.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 11, Witness Rawson," and is forwarded herewith.)

Exam. Sullivan: Do you know any reason why that particular date of March 20th was used for this?

The Witness: No, it was taken as a typical day at the time of the year when we were preparing for this case. It was in the middle of the week. I have forgotten now just which day of the week it was, but it was a midweek day which did not have any unusual traffic conditions.

Exam. Sullivan: No race trains or special trains of any [fol. 98e-27] kind operating over the Long Island on that day?

The Witness: No, there were not any.

By Mr. Gardner:

Q. Have you a statement of the cars stored in storage yards at the Pennsylvania station on a typical day, March 21, 1929?

A. Yes, that was the same day on which we made the check of the trains and cars using each of the station tracks. This is a statement of the cars stored in the storage yard. They are designated by letters on the track plan there, A, B, C, D and E.

Exam. Sullivan: It will be received and marked as exhibit No. 12.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 12, Witness Rawson," and is forwarded herewith.)

Q. Have you a statement of the apportionment of space at track level of the Pennsylvania station and yards be-

tween the Pennsylvania and others and Long Island Railroad on the basis of track occupancy?

A. Yes sir, this statement has been computed from the two previous statements, and making use of the various areas of platforms, tracks, and so forth, at the track level.

Exam. Sullivan: It will be received and marked as exhibit No. 13.

(The same was thereupon received and marked "Appli-[fol. 98e-28] cants' Exhibit No. 13, Witness Rawson," and is forwarded herewith.)

Q. Will you briefly put on the record what this shows?

A. This shows that on a time and space basis of track and platform occupancy, the Pennsylvania and others used 50.66 per cent of the total track level area, and the Long Island used 49.31 per cent.

Q. Well, what is the significance of that?

A. Well, the significance of that is that on this basis the Long Island used—the Long Island use is nearly 50 per cent, whereas on the car and engine count basis which is used in dividing the expenses of the station, the Long Island's proportion of the use is slightly over 40 per cent.

Q. Mr. Rawson, you are familiar with the existing agreement and proposed agreement, are you not?

A. Yes, I am, very.

Q. Will you briefly point out what the fundamental differences are between the two agreements?

A. In the existing agreement, the station above the track level was omitted from the property on which the Long Island was asked to pay rental over a portion of the operating expenses, taxes, or interest on investment. The expenses of the balance of the property were divided on a car and engine basis.

In the new agreement the entire property has been included and the expenses of operating and maintaining the [fol. 98e-29] entire property together with taxes and interest on investment, is proposed to be divided between the Long Island and the Pennsylvania on the car and engine basis.

Furthermore, in the proposed agreement, the interest has been fixed at six per cent, whereas in the present agreement the interest is four per cent, except on the cost for power facilities used, where 4½ per cent rate of interest is charged.

The amount on which interest is computed, both in the present agreement and the new agreement, is the investment in the property as carried on the books of the P. T. & T. Railroad Company. This investment represents practically the original cost.

Q. Not present day?

A. No, it is not at present day value at all. It is very much less. The property was constructed between 1905 and 1910, where prices were less than half of what they are today.

Q. And did you mention that the proposed contract was for a specified period of time?

A. No. The proposed contract is for a period of 20 years, with the option of making certain changes in the five year periods. The present contract was for a short time. It was for—well, when it was finally made, it was retroactive for nearly two years, and then it extended another year, and since then there was an extension of another year, but it was a short term contract. All of the previous contracts have been short term contracts.

[fol. 98e-30] Q. There has been some question as to why the present contract specifies value for power plant, while the proposed contract does not. Will you explain how the power is handled in the joint facility account, and why?

A. The power—electric power for the operation of the trains of all companies in and out of the Pennsylvania station is generated at the power plant in Long Island City. The last few years there is also a small amount of power has been purchased from one of the commercial power companies in New Jersey, to supplement the power supply from the Long Island City plant. This plant also furnishes power for the entire electric operation of the Long Island Railroad outside of the terminal area, for the operation of the trains in what is known as the Hudson and Manhattan Rapid Transit service between Newark and Jersey City and for various other purposes. Only a comparatively small amount of the power is used in the operation of trains over the P. T. & T. property which is jointly used by the Long Island and Pennsylvania. It was, therefore, felt in drawing up this proposed agreement, that the total value of the power plant did not in any way represent the portion which was used for the operation of trains in the jointly used part of the tunnel property, and that was the reason why no value was—or cost, was set forth in this new agreement..

The agreement provides, however, that interest on the [fol. 98e-31] part that is used shall be paid by the Long Island on a car and engine basis at the rate of six per cent.

Mr. Gardner: I think that is all.

Cross-examination.

By Mr. Stover:

Q. Exhibit No. 1 does not include any portion of the joint facilities?

A. No, exhibit No. 1 is the part of the railroad to the west of the tunnel portal. 1, 2 and 3 together show the entire property of the Pennsylvania Tunnel & Terminal Railroad Company.

Q. The joint facilities shown on exhibits 2 and 3?

A. Yes, the joint use of property. The westerly limits of the jointly used property is 10th avenue, Manhattan.

Q. Who owns the property from Harrison to Sunnyside?

A. That is owned by the Pennsylvania Tunnel & Terminal Railroad Company.

Q. What is the relation of that company to the Pennsylvania?

A. That was recently leased to the Pennsylvania Railroad Company under a long term lease.

Q. Does the Pennsylvania own the stock of the Pennsylvania Tunnel & Terminal Company?

A. Yes, it does.

Q. What is the relation of the Pennsylvania to the Long Island Railroad?

A. The Pennsylvania also owns practically all of the stock [fol. 98e-32] of the Long Island.

Q. I think you said that the Long Island began to operate into the station—Pennsylvania station, before the Pennsylvania Railroad?

A. Yes.

Q. Was the date September 8, 1910?

A. The Long Island commenced operation September 8, 1910, and the Pennsylvania—it was November, I think the 29th or 30th—at the end of November, 1910.

Q. And for something over two months, according to the agreement then in force, the Long Island was required to pay all of the expenses attaching to that terminal?

A. As a matter of fact, for the four months—last months of 1910, the Long Island paid rather an arbitrary sum, as I recall it now. In other words, there was no attempt made during that period in 1910 to divide the expenses on any car and engine basis.

Q. But there was at that time an agreement?

A. There was an agreement in effect, which provided that the Long Island should pay on a car and engine basis, but that agreement was never carried out.

Q. Do the Pennsylvania trains carry any passengers in their passage westward from the station to Sunnyside yard?

A. No, they do not.

Q. Why do the Pennsylvania trains make that trip to [fol. 98e-33] Sunnyside yard?

A. The Pennsylvania, when they entered into this project, thought that land on Manhattan was too valuable to use for a storage yard. The long distance trains and cars require considerable space for storage, for cleaning, for other trains and to be sent out on another trip, and land in Manhattan was too valuable for that. They might have made a return movement to New Jersey, but that makes a more difficult and complicated terminal movement. They wanted to get advantage of the through movement through the terminal of the trains to the storage yard, and that is why the storage yard was put on Long Island.

Q. So that the storage yard and terminal station were constructed for Pennsylvania purposes?

A. They were, but there are four tunnels under the East River, whereas there are only two tunnels under the North River, and if it had not been for the proposed Long Island use of the Pennsylvania station, the Pennsylvania would not have needed more than two tunnels under the East River.

Q. But the Pennsylvania would in any event have required two tunnels and the Sunnyside yard?

A. Yes sir.

Q. Can you give me the mileage of the Long Island Railroad?

A. The route mileage is a little over 400 miles.

Q. Can you give me the route mileage of the Pennsylvania?

[fol. 98e-34] A. I don't recall now, but I think it is something like 10,000 miles.

Q. The Long Island, you say, is a commuting road?

A. Yes, it is largely a commuting road.

Q. The Pennsylvania does not bring its commuting traffic into the Pennsylvania station?

A. No, not any more than it can help.

Q. What happens to the Pennsylvania commuting traffic?

A. The Pennsylvania commuting traffic, except from the longer distance points—that is, such as New Brunswick, Trenton and Philadelphia—is brought in to the Hudson & Manhattan terminal at downtown, New York. That is the trains of the Pennsylvania are brought into Jersey City, the passengers transfer there and take the Hudson tunnels to New York or some of them take the ferry to New York.

Q. So that no strictly commuting trains on the Pennsylvania road are brought into the Pennsylvania station?

A. No.

Q. What is the present rental paid by the Long Island to the Pennsylvania? Was that the last available period—is that on exhibit 6?

A. Yes, that is shown on the one headed Statement of amounts paid by the Long Island Railroad Company for the use of the Pennsylvania terminal, 1911 to December 31, 1928. That shows that for the year 1928, the Long Island paid the [fol. 98e-35] Pennsylvania as the portion of the joint facility operating facilities, $459,902; interest on valuation, $1,361,-842; proportion of taxes, $550,398, or a total for those items of $2,372,142.

It also paid as a portion of the power charges, including the rental on power facilities, $324,416, and an item of what we call direct operating charges of $138,623, a grand total of $2,835,181.

Exam. Sullivan: That is exhibit No. 6?

The Witness: That is exhibit No. 6, yes.

Exam. Sullivan: That payment is under the existing agreement?

The Witness: That payment is under the existing agreement.

Exam. Sullivan: The proposed agreement amends the existing agreement solely in respect of the amount of rental paid?

The Witness: Yes, that is substantially so.

By Exam. Sullivan:

Q. It includes some additional property?

A. No, there is no additional property included.

Q. I understood you to say that the proposed agreement included the stations ——

A. I see what you mean, yes. In determining the rental which the Long Island should pay in the proposed agreement, the entire property is included. In the present agreement an amount was deducted for the station above the track level.

Q. Why was that deduction made?

A. That deduction was made at the instance of the Transit [fol. 98e-36] Commission when the last agreement was before them.

Q. And on what theory?

A. On the theory that the Long Island did not make as full use of that part of the station as it did of the track level.

Q. Mr. Rawson, have you caused any estimate to be made as to what the amount of rental would amount to in dollars under this proposed amendment?

A. Yes, we have made an estimate of what it would be for—would have been for the year 1928.

Mr. Gardner: Would you like that?

Mr. Stover: Yes, I would like to have it. It appears from exhibit 6 that the rental under the proposed—under the existing agreement for 1928 totaled $2,835,000—$2,835,-181.

The Witness: Yes.

By Mr. Stover:

Q. What would the total be under the proposed agreement?

A. Under the proposed agreement, the Long Island Railroad would have paid in 1928 a total of approximately $3,969,619, which compares, Mr. Stover, with the amount in the total column on exhibit 6 of $2,373.142. That is on the statement which I prepared—estimate which I made of what the Long Island Railroad would have paid in 1928 under the proposed agreement. The items of power and direct operating charges are not included.

Q. What would be the figure which corresponds to the [fol. 98e-37] $2,835,000?

A. Approximately $4,450,000.

Q. Is the time or space element considered in either the existing or the proposed agreement as a basis for determining the amount of rental?

A. No, except that in the existing agreement there is certain space which is excluded entirely. That was the only consideration that was given to the space element.

Q. But the rental in both cases is based upon what you term the wheelage basis?

A. Yes sir, it is.

Q. Would you explain briefly, but a little more explicitly what that wheelage basis means?

A. The wheelage basis means that the expenses of operation, maintenance, taxes, interest on investment, et cetera, are apportioned in accordance to the use of where the unit use is taken, to be a car. That is, the cars of each company are counted when they enter each of the three zones into which the terminal area is divided, and when they leave each of those three zones.

Q. I have not had an opportunity to examine all of these figures which have been introduced in rapid succession. Is there anything in evidence so far which shows the boundaries of those zones?

A. They are shown on the maps that were described here [fol. 98e-38] in various exhibits, but I will explain it to you briefly.

The station zone extends from the middle of 10th avenue on the west to the middle of Sixth avenue on the east, and embraces the entire property of the Pennsylvania Tunnel & Terminal Railroad Company between those boundaries. The north and south boundaries are roughly 31st street on the south and 33rd street on the north.

The next zone which is called the tunnel zone, extends from 6th avenue on the west to Harold avenue in the Borought of Queens, adjacent to the Sunnyside Yard on the east. Harold avenue is where the junction is made with the tracks of the Long Island Railroad. The third zone embraces the Sunnyside Yard.

Q. Are those zones defined in the agreement itself?

A. The zones are defined in the agreement itself and illustrated by a sketch map which is attached to a part of the agreement.

Q. I think I asked you a question which I did not pursue, and that was whether at the time the existing agreement, was before the Transit Commission for its approval, a great deal was not said about the monumental feature of the station structure above the track and street level.

A. Yes, that was discussed at great length.

Q. The contention was, as I recall it, that here we had a lofty and magnificent structure which was appropriate to [fol. 98e-39] a great trunk line interstate railroad, but was beyond the needs and the means of a small commuting road like the Long Island Railroad?

A. Yes sir, that as I remember was the contention.

Q. And that was the reason, was it not, why the agreement excluded that portion of the structure from the joint facility account?

A. I assume that was the reason—main reason why the Transit Commission insisted that this be excluded.

Q. You have testified as to the possible means of egress and exit—ingress and egress from the Long Island tracks?

A. Yes.

Q. Have you ever made any count to indicate exactly where the Long Island commuters go after they disembark on the Pennsylvania platform?

A. Passing from the station, no. We have thought of doing that many times, but could never work out a satisfactory way of doing that. I have simply relied on my general and continuous observation when I state that they use those portions of the building which are commonly spoken of as the Pennsylvania part of the building extensively. That is, where I said before, 14 trains come in in the morning,—16 trains that come in in the morning on what we call the Pennsylvania side of the station, and the passengers from those trains come up the exit stairways, not only into the lower or exit concourse, but also into the [fol. 98e-40] upper or entrance concourse. They pour out of all four stairways and they from there spread themselves through the entire building.

Q. You said, I think, that the Long Island passengers used all portions of the Pennsylvania station?

A. Yes.

Q. You have also said that you never made a count or check to see exactly where they did go, and I assume by that that you mean from your general observations?

A. From my general observations, yes.

Q. The Long Island has a separate waiting room and separate ticket office of its own, has it not?

A. Yes, it has.

Q. Where is that located?

A. That is located in the northeast corner of the building, in what is called the exist concourse level. That is the first level above the track level.

Q. How much space is devoted to that use of the Long Island waiting room and Long Island ticket office?

A. I haven't the figures here now, but if you let me have one of those maps I can tell you roughly.

Well, there is a space first, the concourse near the stairway about 100 feet wide and something over 100 feet long—100 feet square. Then you have got the larger concourse; it spreads out into a space of about 150 feet by 200 feet, [fol. 98e-41] and then the further concourse down to the stairway to 34th street is about 50 feet wide and another 150 feet long.

Q. How does that space compare to the general waiting room?

A. Well, looking at these two maps here, I should say that it was from two thirds to three quarters of the area occupied by the general waiting room, with the two subwaiting rooms, the men's and women's waiting rooms.

Q. About what is the height from the floor to the ceiling in those two waiting rooms which are used by the Long Island?

A. Well, that runs from perhaps 12 or 15 up to 20 or 25 feet—various heights in different parts of it there.

Q. What would be the height of the main waiting room?

A. That I guess extends up to 50 or 60 feet.

Mr. Hotchner: When you say "main," you mean the Pennsylvania Railroad?

The Witness: Yes.

Q. While you may regard it as possible that the commuting traffic may use parts of the main waiting room, you don't regard it as very probable, do you, that any consider-

able number of them make any use of that main waiting room?

A. They use it mainly as a passage way in getting to and from trains. There are quite a good many people now come into—coming to the Long Island trains, since we opened up that stairway from the main waiting room directly down into the Long Island concourse. There has a stairway been opened there within the last year or so. A [fol. 98e-42] good many people come through that way to get to the Long Island trains. It affords an easy means of access to people coming from 8th avenue, south of 31st street, and from 31st street, to come through the main waiting room and back down through that passage way.

Q. They don't have to go through there, but it is a convenience?

A. Yes sir.

Q. Short cut?

A. Yes. Then I think too that you will find that since the Long Island waiting room and concourse there has become more congested, which it has in the last few years, that more people who have to wait for a considerable period of time for their train, will go up and sit in the waiting rooms upstairs where there is more room for them.

Q. Is it very often that the Long Island waiting room does become congested?

A. Yes, that is pretty crowded.

Q. On the racing days?

A. The race traffic does not use the Long Island waiting room at all. They use the Pennsylvania loading concourse.

Q. Has it been your experience that the commuter as a rule comes to the station sometime in advance of his train and waits there?

A. No, the commuter does not, unless he misses his train, but there are other passengers besides commuters.

[fol. 98e-43] Q. But the bulk of the traffic, as I think you said, was commuting traffic?

A. Oh, yes.

Q. The bulk of the people that use the Long Island, simply arrive there pretty nearly on schedule, and go down and get their train and go out?

A. That is it.

Q. In the morning when they disembark from the train, they seek the street by the nearest exit and get out?

A. Yes.

Q. So that the only use they make of the station and its monumental features, is in passing through it?

Mr. Gardner: I object to the monumental feature.

Mr. Hertzoff: You don't disagree it is a monument?

Mr. Gardner: I disagree with asking this witness a question about the monumental features, and the use of the monumental features.

Exam. Sullivan: Is the witness familiar with the subject?

The Witness: Yes.

Exam. Sullivan: He can answer the question?

The Witness: Yes.

Exam. Sullivan: I would suggest in the interest of economy of time, and so forth, he be permitted to go ahead.

(Question as above recorded was repeated by the reporter.)

[fol. 98e-44] The Witness: Yes, that is true.

By Mr. Stover:

Q. Is it your opinion that any of the passengers that use that station are attracted by reason of these architectural features?

Mr. Gardner: Asking him—they certainly are. That is what has built up the Long Island.

Q. Can you answer the question?

A. No, I don't believe so, not any great number.

Q. The Long Island Railroad has a monopoly on Long Island, has it not?

A. Of what we call rail transportation as distinguished from Rapid Transit or other means of transportation. There are of course many Rapid Transit lines now extending out on Long Island, and there are many bus lines.

Q. But there are no Rapid Transit lines that extend beyond the limits of the City of New York?

A. No.

Q. And they don't extend as yet to the limits of that City?

A. No, they do not.

Mr. Gardner: I wonder, Mr. Stover, if you could produce a Rapid Transit map before the hearings close, if you have one?

Exam. Sullivan: Mr. Stover did not know whether he had such a one, but he would produce one if they had it at the Transit Commission.

By Mr. Stover:

Q. During what hours of the day are the tracks leading [fol. 98e-45] into this terminal used by the Long Island Railroad?

A. You mean the tracks that come into the Pennsylvania part, I am speaking of?

Q. Yes.

A. That is in what we call our morning commission hour, between 7:30 and 9:30.

Q. Taking the eastern movement at night, for what period?

A. That is between about 4:00 and 6:30.

Q. Some of the tracks in the station itself are used for storage of Long Island cars, preparatory to making their morning trip out, are they?

A. Well, not many preparatory to making the morning—prepartory to making the evening trip out. During the day time there are some, but only for fairly short periods during the day time. There are tracks in what we call the storage yards, in the western part of the station area, that are used for storage of Long Island cars during the day mostly.

Q. Are they used for storage purposes at night?

A. To some extent, but most of the Long Island cars are stored at the eastern end terminals during the night. The main tide of traffic moves west in the morning and east in the evening.

Q. During what hours of the day are the tracks within the station or immediately towards the station, used by the Long Island?

A. Well, they are used at all hours of the day.

[fol. 98e-46] Q. And night?

A. And night, yes. We have trains scheduled, I guess not more than an hour apart, all through the night.

Q. When does your hourly schedule begin?

A. Well, there is more than one train an hour up to 1:30; I know around 1:30 there are two or three trains going out to different parts, and at the same time, at 2:30

there are two or three trains which go out; then I think there is a gap around to 3:30 or 4:00, and then the trains begin to increase in number.

Q. But the daytime is the period of the more intensive use?

A. Yes.

Q. And that is localized to certain morning and evening hours?

A. Yes, it is.

Q. At those periods the cars move in and out with some intensity?

A. Yes, great intensity.

Q. Considerable rapidity?

A. Yes.

Q. Cars come in, and without waiting very long, turn around and go out?

A. They do, yes.

Q. Now, the same thing is by no means true of the so-called Pennsylvania trains, is it?

A. The Pennsylvania has some peak traffic. What I [fol. 98e-47] mean is there is a crowding of trains in—coming in from the west in the morning between—well, about 7:00 and 9:30, again going out in the late afternoon, but the peak is not nearly as pronounced as in the case of the Long Island traffic.

Q. What normally happens to the Pennsylvania train that comes in from the west?

A. The Pennsylvania train comes in from the west; it discharges its passengers, and then moves to Sunnyside Yard.

Q. What happens to it there?

A. There it is cleaned, the cars are cleaned, reconditioned and made ready for a movement west again.

Q. About how long a time does it occupy in the Sunnyside Yard?

A. I don't know exactly, but I should say that those cars probably are there an average of some 12 hours.

Q. How long a time elapses between the time it arrives into the Pennsylvania station and disembarks its passengers, until the time when it is back in the Pennsylvania station, ready to leave for the west?

A. Well, I say I think about 12 hours—I should say.

Q. And is it not customary for the Washington and other through trains to remain for quite a long period on the tracks?

A. With the exception of trains—sleepers which leave late in the evening and are put there earlier for occupancy, the Pennsylvania trains do not remain very long at the [fol. 98e-48] platforms. I should say 20 minutes was a fairly reasonable time—average time.

Q. You are excluding now the sleepers?

A. Yes, they are brought in—a number of sleepers—they are brought into the station about 10 o'clock in the evening—shortly before 10. They are made ready for occupancy, and then they move out any time from 11:00 to 1:00 or even 2:00 o'clock.

Q. The waiting time of the Pennsylvania cars takes place in the Sunnyside Yard?

A. Yes.

Q. They wait there until it is nearly time for the train to go out, and then they are brought out to the station platforms, people get aboard just about the same as they do on the Long Island commutation trains?

A. Not quite. I think they are kept at the platforms somewhat longer—from 15 to 20 minutes they are made ready before the train goes out. In the case of the Long Island, in the commission hours—that is in the evening, when there are a great many trains going out, a train is dispatched from the platform about every 10 or 12 minutes.

Q. I think you have said that there is practically no commuting trains on the Pennsylvania that come into the station?

A. Yes—not to the same extent or the same manner as the Long Island commuting trains.

[fol. 98e-49] Q. Now, the operating expenses, maintenance, taxes and the interest on the investment of that part of the terminal, in addition to the service which is used by the Long Island, I understood you to say that the Long Island paid something over 40 per cent?

A. Yes, the percentage for sections 10th to 6th avenue, in 1928—the average percentage is 41.44 per cent.

Of the tunnels under the East River, 59.94 per cent; and the Sunnyside Yard, 11.6 per cent.

Q. Those are the percentages which work out on the wheelage basis?

A. Yes sir.

Q. Does it seem fair to you, Mr. Rawson, that a small road, 400 miles long, entirely within one state, carrying on a commutation traffic, should pay 40 per cent of the operating expenses, maintenance, taxes and interest on investment of a terminal which was made primarily to serve the need of a large trunk interstate railroad, and having 10,000 miles of road?

A. I don't quite agree, Mr. Stover, with your assumption that the terminal was made primarily to serve this large road. It was built for both railroads, in my opinion, and what I have learned, and that I think may change your——

Q. I want to be perfectly fair with you, if I can get a word to substitute for primarily. The situation as I understand [fol. 98e-50] it is this: That the station and all the tunnels west of the station were built solely for the Pennsylvania; that two of the tunnels eastward from the Sunnyside Yard were built exclusively for the Pennsylvania; that two tunnels were added for use by the Long Island. Now, it may not be exactly accurate to say under those circumstances that the station was built primarily for the Pennsylvania, but with the understanding of the word primarily, based on the explanation which I have given you, I ask you again if you consider it fair, under all the circumstances, that the Long Island should pay 40 per cent of the operating expenses, maintenance, taxes and interest on the investment?

A. Why, yes, and I think the Long Island is very fortunate to have anybody build this terminal and permit them to use it. It is what has made the Long Island Railroad, the Pennsylvania station. The Pennsylvania Railroad has many other terminals, some of them very nearly as large and as expensive as the Pennsylvania station here in New York—Washington, Philadelphia and Chicago are three, which approach in size and magnitude and expense this New York terminal. The Long Island has only this one large terminal. The Long Island's business has grown tremendously since the Long Island trains were brought into the Pennsylvania station, and I think that growth was largely due to the ability of the Long Island to use the Pennsylvania station. Now, under such circumstances it [fol. 98e-51] does not seem that you can say that it is un-

fair for them to pay 40 per cent or 50 per cent or 60 per cent. The number of Long Island passengers using this station was nearly 50 million last year, while the number of Pennsylvania passengers was 10 million. As you will see by that statement, the number of Long Island passengers have doubled in the last 10 years, while during the past 10 years the number of Pennsylvania passengers remained almost the same, so that the Long Island has benefited enormously from this station.

Q. Is it not true that the average fare of the Pennsylvania passenger would vastly exceed the average fare of the Long Island passenger?

A. That is true, yes, but out of that fare the Pennsylvania must haul the average passengers possibly a hundred miles, and probably has to pay the expenses of a terminal at the other end of the journey—maybe one or two intermediate terminals besides.

Q. Is it your opinion that the rental which the Long Island pays should be based in proportion to the value to it of the facility which it enjoys?

A. I think that might be a very fair way of determining, if it was possible to determine it, but that is one of the things which can only be determined in a general way.

Q. Is not this wheelage method an attempt in general to solve the problem along those lines?

[fol. 98e-52] A. It is an attempt to measure the relative use and not the value to the Long Island of that use. It is an attempt to measure the actual use by the most convenient unit of use which we know of.

Q. Your opinion, I take it, would be, that is the ideal would be to charge the Long Island for the use of the Pennsylvania station and equivalent to the benefit which it derived from the use of it?

A. I say that might be a very good way of doing it if it were possible to determine that, but I know of no way of determining that with any degree of accuracy.

Q. That is what you regard as the ideal?

A. Yes.

Q. And this is only an imperfect mechanical approximation towards the ideal?

A. It is the best method that I know of determining the relative use.

Q. Now, would you say that the proportion of the expenses, taxes, et cetera, which the Pennsylvania pays, should also be based on that principle of determining the value to it?

A. Well, you have got to divide the total expenses, taxes, and so forth in some way, and the Pennsylvania being the owner, and you might say the parent company—the landlord,—why, it in a measure would have to pay what was left after the Long Island payment had been made.

[fol. 98e-53] Q. Your idea is that the Pennsylvania, being the landlord, should drive as hard a bargain as possible, and secure, as a good business man, as much rental from the lessee as possible, so as to leave as little as possible of the operating expenses, taxes, and so forth, to be paid by itself?

A. No, I don't think it should drive as hard a bargain, but I was saying that on this basis, where the two use it in common, it would be pretty difficult to make the division in accordance with the benefits receives, so we have fallen back on the method of asking for the payment in accordance with the use.

Q. Do you know—I assume that you put a certain value on this joint facility property?

A. Yes, the cost or the investment in the property.

Q. Do you know what sum would be necessary to meet—for that portion of the terminal and its facilities which is covered by the joint facilities—what sum would be necessary to meet the operating expenses, taxes and interest on the investment?

A. About $9,100,000.

Q. That amount would cover all of the expenses and charges which I mentioned?

A. Yes, on the portion of the property from 10th avenue to and including Sunnyside Yard, and that does not include these charges for power or direct charges either.

Q. Under the proposed agreement, I think the Long Island, it is estimated, would pay roughly about half of that?

[fol. 98e-54] A. Would pay $3,969,000—a little less than one half.

Q. So that the Long Island would pay a little less than half of all those expenses and charges, and the Pennsylvania would pay a little more than a half?

A. Yes sir.

Q. And that would produce a certain return on the investment?

A. Yes, six per cent.

Q. Do you think it is necessary in the case of a road like the Pennsylvania, to provide a return on every portion of its road, taken separately and apart from the rest of the system?

A. I don't know that it is necessary, but it is certainly *is* very desirable.

Q. This is the most wonderful and most expensive part of the whole Pennsylvania construction, is it not?

A. Yes, I think probably it is.

Q. And that part is to be made self-supporting by the rental paid by the Pennsylvania and the rental paid by the Long Island?

A. Yes. Under the lease the Pennsylvania is now obligated to pay the fixed charges and return on the investment in the P. T. & T. property.

Q. Very nearly half of that sum is to be paid by the Long Island?

A. That is on this part of the Pennsylvania station property.

Q. Of course, the part west of the portal on 9th or 10th avenue?

[fol. 98e-55] A. 10th avenue.

Q. 10th avenue is not used by the Long Island at all, is it?

A. No.

Q. Obviously, it would not be just to require them to pay any of the expenses or taxes and interest on that part?

A. No.

Q. But for the part which they do use in any degree, they contribute to the extent of almost 50 per cent?

A. Let me just figure that percentage a little bit closer. It actually figures 43.6 per cent.

Mr. Stover: Well now, if the Commission please, there has been introduced in rapid succession, 13 exhibits. I have not had time to even examine them. Obviously I cannot cross examine on them. Tomorrow I have an engagement, a regular meeting of the Transit Commission which I cannot break, and at this point I would like to present my motion to dismiss, which I spoke of earlier in the day.

Exam. Sullivan: Mr. Gardner, do you anticipate having Mr. Rawson with us right along?

Mr. Gardner: Oh, yes. I cannot go very far without Mr. Rawson.

Exam. Sullivan: That will be all right. We won't go any further with the cross examination this afternoon, so you may now present your motion, if you so desire, Mr. Stover.

[fol. 98e-56] Mr. Hertzoff: I would like to ask two or three questions, as I may not be here at the next hearing.

Exam. Sullivan: All right. Go ahead.

By Mr. Hertzoff:

Q. Mr. Rawson, would you mind giving me the figures that make up this $3,969,619 figure, compared to what they are on exhibit 6, so we can tell where the increase comes in? I want to see what these items on exhibit 6 are going to make up.

A. The operating expenses under the proposed agreement would be $1,339,194 as compared with $459,902 now paid.

The interest item under the proposed agreement would be $2,400,921 as compared with $1,361,842.

The taxes would be $681,384 as compared with $550,398.

From that there would be deducted a credit on account of rentals and concessions which the Long Island does not receive now at all under the present agreement of $451,880, making a net total of $3,969,619.

The item for power would be increased about $20,000—I did not figure exactly—over the amount shown on exhibit 6.

The direct operating charges would be just the same—be no change in those.

Mr. Hotchner: No change in direct operating expenses, you say?

The Witness: No change in them.

Q. So that most of those increases would be eaten up by [fol. 98e-57] things without any more benefit to the Long Island Railroad?

A. No more benefit, no, because the Long Island would not enjoy the use of anything more than it enjoys at the present time.

Q. You said something about a change from 4½ to 6 per cent. Is that what makes that jump from $1,361,000 to $2,400,000?

A. That is a change from 4 per cent to 6 per cent, and also the inclusion in the proposed agreement of the station above the track level, which was put in at $15,000,000.

Q. How much is due to the change from 4 to 6?

A. Well, the change from 4 per cent to 6 per cent would simply add 50 per cent to the $1,361,000 or about $630,000.

Q. About $2,000,000?

A. Yes sir.

Q. You said you thought that the growth of the Long Island Railroad commuter business is due to the fact that they have the Pennsylvania station?

A. Yes.

Q. You think without the Pennsylvania station, nobody would move on Long Island?

A. Without the Pennsylvania station or some entrance into Manhattan Island, I think Long Island would have grown very much slower than it has grown, and the Long Island traffic would also have grown very much slower than it has. Of course it is idle to speculate just what would [fol. 98e-58] have happened. We know before the station was built the growth was very much less.

Q. You know Long Island was nothing but a lot of farms before the station was built, was it?

A. Largely, yes.

Q. So that with the station, or no station, you would have had people there by now?

A. I don't know. I say that is very difficult to speculate.

Q. Still you say that the growth of the Long Island commuter is due to the great benefit of having the Pennsylvania station?

A. I think so. That is my opinion, yes.

Mr. Hertzoff: That is all for the present.

By Mr. Stover:

Q. The Long Island Railroad company has in mind the construction of a terminal station at Diagonal street?

A. To take the overflow from the Pennsylvania station.

Q. A terminal to relieve——

A. To relieve the Pennsylvania station.

Q. The idea being that you can bring the people from the east of Long Island to Diagonal street station, where they will be dispersed over the city by means of the city Transit lines?

A. Yes.

Q. That would enable the Long Island to grow even if there were no Pennsylvania station, would it not?

A. I do not know how successful it would be. So far we [fol. 98e-59] have met with nothing but opposition to the establishment of this terminal.

Q. Assuming that your plans can and will be carried out?

Mr. Gardner: That depends on your Commission.

Mr. Stover: Now, stop a minute.

Mr. Gardner: I won't stop at all.

Mr. Stover: All right. Keep on.

Mr. Hotchner: Also the commuters will have something to say about it. Don't load it on the Commission, and don't give the Commission all the credit.

By Mr. Stover:

Q. Assuming that your plans can and will be carried out, and Diagonal street station is constructed, that would enable the Long Island to continue its growth, even though the Pennsylvania station facilities were not open to it, would it not?

Mr. Gardner: Shut up the Pennsylvania station and use your subways, you mean?

The Witness: I do not know what would happen. I would hate to speculate. We had only that Diagonal street as a supplement to the Pennsylvania station, to take the passengers which it would be impossible to bring into the Pennsylvania station, and we are approaching the time when it will be impossible to bring any more people into the Pennsylvania station. They will have to be taken elsewhere.

Exam. Sullivan: Now proceed with your motion.

[fol. 98e-60] Mr. Gardner: I have an exhibit, a paper handed me when Mr. Stover asked me for some information, and I would like to put it in evidence.

Mr. Stover: No objection.

By Mr. Gardner:

Q. What is the paper that I hand you?

A. That is the division of the expenses on a car and engine basis between the Long Island Railroad Company and Pennsylvania Railroad Company and others operating

over the P. T. & T. Railroad Company, for the year 1928, on the basis of each road bearing its proportion of the rental and expenses on an actual user basis—that is, on the basis of the proposed contract.

Exam. Sullivan: The statement will be received and marked exhibit 14.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 14, Witness Rawson," and is forwarded herewith.)

Mr. Stover: The Pennsylvania Tunnel & Terminal Railroad Company owns the Pennsylvania station and certain tunnels leading thereto under the North and East Rivers. They lease that to the Pennsylvania Railroad Company, which owns all of the stock of the Pennsylvania Tunnel & Terminal Railroad Company. The Pennsylvania, in turn, grant trackage rights to the Long Island Railroad Company, of which the Pennsylvania owns practically all the stock. The Pennsylvania has—the Long Island has been [fol. 98e-61] operating there since 1910, and is now operating under an agreement. The parties have prepared an amended agreement, which amendment affects merely the amount of rental which the Long Island will be required to pay, and they come before this Commission under two sections, asking first for authority to do something which they have been doing since 1910, and the Pennsylvania joins the Long Island in asking that this Commission require it to do something which it has been voluntarily doing since 1910. The application is sought to be brought within the jurisdiction of the Interstate Commerce Commission under the two sections: The first is paragraph 18 of section 1 of the interstate commerce act. Now our contention is, first, in respect to that section, that this is not a case where the Long Island is undertaking an extension of its line of railroad, or the construction of a new line of railroad, or to acquire or operate any line of railroad or extension, or to engage in transportation over or by means of such additional extended line of railroad.

Second, that even if the actual situation could be brought —the trackage rights could be brought within any one of those provisions, that that section enacted in 1920 is not retroactive, and was not intended to apply to extensions or

operations, et cetera, already in existence when the act came into effect.

The fact that they rely upon two sections, seems to indicate doubt in the mind of the applicant as to whether they [fol. 98e-62] have power or not. I take it it must be under one or the other of these two sections involved, and that the deficiency of one cannot be eked out and supplemented by appealing to the other. For the reasons which I have given, it seems to me apparent that no jurisdiction is conferred under paragraph 18 of section 1 of the interstate commerce act, and my contention is not that Congress has not the power to delegate jurisdiction to the Commission, but simply that it has not done so. In other words, designed or intended to describe an entirely different kind of transaction from a trackage agreement, and in no event applied to trackage agreements which were already in full force and effect, and have been for going on 20 years; nor does it come under the other subdivision, section 3 of paragraph 4, which provides that under certain contingencies the Commission shall have power to require the use of any such terminal facilities by another carrier or carriers. It is an anomalous and to my mind a ridiculous situation where the Pennsylvania comes before this Commission and asks the Commission to require it to concede the use to the Long Island of its terminal facilities, when it has granted voluntarily the use of those facilities, under an agreement which is already in evidence, and which has been in force for nearly 20 years.

I shall refrain from further argument on the point at this time, as I merely want to outline in general detail the nature [fol. 98e-63] of my argument, and having done so, I accordingly move that the matter be dismissed as one not coming within the jurisdiction of the Interstate Commerce Commission.

Mr. Hertzoff: For the City of New York, we join.

Mr. Hotchner: The Association of Long Island Commuters join in the motion, and on all the grounds stated by the counsel for the Transit Commission, and on several additional grounds. As stated in various portions of the petition for intervention filed by the Association of Long Island Commuters, the facilities covered by this proposed agreement are entirely within the City of New York, and it has been so stated by Mr. Rawson during his testimony

today. As stated in the petition, a similar agreement to the one now proposed, except as to certain changes, was presented by these same three railroad companies to the Transit Commission of the State of New York for its approval, and exhaustive hearings were had in the years 1925, and 1926, with largely the same material adduced as has been adduced today. After those exhaustive hearings, and after exhaustive survey, in which a great deal of time was consumed and a great deal of money was expended, the Transit Commission of the State of New York which, as the Interstate Commerce Commission must be informed, is a body constituted by the State of New York for considering matters of this kind, among others, rejected the proposed agreement presented by the three railroads. Thereafter, as set forth in our intervening petition, and as [fol. 98e-64] referred to generally by this witness today, a new agreement was proposed, generally similar to the one previously rejected by the Transit Commission, but changed in some details, particularly in the detail that the new proposed agreement excluded that portion of the Pennsylvania station which was above the track level, and as altered the Transit Commission gave its approval to the agreement. Thereafter, I believe, and within a year, a third set of agreements was presented by these railroad companies for approval to the Transit Commission, providing for increased rental expenses, and that was rejected by the Transit Commission. So we have a situation, gone over three times by a body constituted by the State of New York for the consideration of such matters.

Now nothing new has occurred to change the character of the proposed agreements, except that now these three railroads make their appeal to a Federal body. For what reason they have changed their appeal from the State body to the Federal body, no explanation yet has been offered here today, and while perhaps from a strict legal standpoint the railroad is not obligated to offer any explanation, yet it is a matter of very great interest, so far as public policy is concerned.

Now these proceedings are very expensive to maintain, not only by the railroads, but on the part of the protestants, who perhaps are not as well organized for contesting same [fol. 98e-65] as are the railroads.

Exam. Sullivan: Let us get to the motion, if possible, and then you can argue it in your brief or in oral argument before the Commission.

MOTION TO DISMISS

Mr. Hotchner: On the grounds set forth by counsel for the Transit Commission, and on the grounds set forth further in our petition for intervention, and on the grounds I have just mentioned, I move that the petition and application of the railroads be dismissed and rejected.

Exam. Sullivan: The motions for dismissal are denied.

Mr. Hotchner: Of course we except to that.

Exam. Sullivan: Exceptions to the ruling will be noted.

Mr. Hertzoff: Include me.

Exam. Sullivan: It is my understanding that all three of the protestants in this case or the interveners join in that motion.

We will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 4:30 P. M., July 2, 1929, further hearing in the above matter was adjourned until 10:00 A. M. July 3, 1929.)

[fol. 98e-66] New York, N. Y.,
July 3, 1929, 10:00 o'clock a. m.

Met pursuant to adjournment.

Appearances: Same as before.

F. J. FELL, JR., was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Gardner:

Q. Mr. Fell, what is your official relation to the Pennsylvania Railroad Company and the Long Island Railroad Company?

A. I am vice president and comptroller of the Pennsylvania and the Long Island Railroads.

Q. How many years have you been in the railroad service?

A. 33 years.

Q. With the Pennsylvania?

A. With the Pennsylvania.

Q. What is the financial relation of the Pennsylvania Railroad Company to the Pennsylvania Tunnel & Terminal Railroad Company?

A. The Pennsylvania Railroad Company owns all of the stock of the Pennsylvania Tunnel & Terminal Company?

Q. And it is lessee——

A. And it is lessee of the property of that company.

Q. That lease is dated June 14, 1928, is it not?

A. It is.

[fol. 98e-67] Q. Was approved by the Interstate Commerce Commission?

A. On August 4, 1928, Finance Docket 6968.

Q. And it has been testified, I believe, that the Pennsylvania Railroad owns all but a few shares of the Long Island Railroad Company's stock; is that a fact?

A. That is a fact.

Mr. Hotchner: What is the date of the approval by the Interstate Commerce Commission?

The Witness: August 4, 1928, Finance Docket 6968.

Exam. Sullivan: Who owns the few shares the Pennsylvania does not?

The Witness: They are owned by outside interests.

Exam. Sullivan: Do you know how many approximately shares are owned by parties other than the Pennsylvania?

The Witness: Yes sir, less than a hundred.

By Mr. Gardner:

Q. The Pennsylvania Railroad Company guarantees the principal and interest of the Long Island Railroad Company's refunding mortgage bonds, does it not?

A. It does to the extent of such issue having a par value of $26,500,000.

Q. Have you a statement showing the number of passengers and tons carried by the Long Island, 1909 to 1928?

A. I have.

Mr. Gardner: I offer that in evidence.

Exam. Sullivan: The statement described will be re-
[fol. 98e-68] ceived as exhibit No. 15.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 15, Witness Fell," and is forwarded herewith.)

Q. Have you a statement, showing the gross earnings, net railway operating income and service of the Long Island, 1909 to date?

A. I have.

Mr. Gardner: I offer that in evidence.

Exam. Sullivan: It will be received and marked as exhibit No. 16.

(The same was thereupon received in evidence, marked "Applicants' Exhibit No. 16, Witness Fell," and is forwarded herewith.)

Q. Is the wheelage basis an equitable basis for making proportion of operating, maintenance charges, taxes and rental, and interest in this proposed contract?

A. It is in my opinion. It is the basis which has been used at many points and found to be the most practical and fair method for charging out these items in large terminals. It is a usage basis.

Q. And your experience qualifies you to have an opinion on that subject?

A. We have contracts with many other railroads and other railroads have contracts with us, and they are prin-
[fol. 98e-69] cipally on that basis.

Q. Is the rate of interest, six per cent, in this proposed contract, in your opinion a fair rate?

A. In my opinion a rate of six per cent is a fair rate. It is practically the legal rate of interest in the states of New York and Pennsylvania. It is the rate allowed in the Transportation Act for recapture. It is the rate prescribed in the Transportation Act as the rate of interest which shall be paid by any carrier who borrows money from a revolving fund created from the earnings recaptured.

Q. The basic amount used for the rental, it has been testified to, is the original cost and not the present cost for reproduction?

A. That is correct.

Q. Now, was there any interest during construction charged to the accounts of the company prior to 1920—that is, the P. T. & T.?

A. Prior to 1920, no interest was charged during construction—during the period of construction.

Q. In this case the basic amount for present day value instead of the original cost, the rental value, would be much greater, would it?

Mr. Hotchner: I object on the ground that that is immaterial and irrelevant. It has nothing to do with this issue—what the rental would be if another amount were [fol. 98e-70] used than the one now being offered.

Exam. Sullivan: Objection overruled.

Mr. Hotchner: I also object and ask that the answer to the previous question be stricken out as to whether any interest was charged during a period of a number of years ago. I think that it has no relevancy to the inquiry now before this Commission.

Exam. Sullivan: The request that that answer be stricken is in the form of a motion?

Mr. Hotchner: Yes.

Exam. Sullivan: The motion is denied, and the objection is overruled.

Mr. Hotchner: Exceptions in both cases.

Exam. Sullivan: The exceptions to the ruling will be noted.

By Mr. Gardner:

Q. The rental value would be greater, would it not?

A. It would.

Q. Roughly, how much?

A. At least double.

Q. And in leases that you know of recently passed on, has the present day value been used rather than the original cost?

A. I know of leases recently made in which the present day value has been used.

Q. What has been the policy of the Pennsylvania Railroad Company since it purchased an interest in the Long [fol. 98e-71] Island in 1900, towards the Long Island?

A. The Policy of the Pennsylvania Railroad towards the Long Island has been to foster the business of the Long Island Railroad Company—practically nurse along the

Railroad—the Long Island Railroad Company, at its own expense, so as to put it on a basis where it would be financially self-dependent.

Mr. Hotchner: Just one minute. I think both the question and answer are irrelevant, incompetent and immaterial, and I object also on the ground that this is a declaration in self-interest, and that if the opinion or conclusion is to be reached, the facts should be given and not a statement or a speech, for want of a better word, on the part of this witness. The facts should be given, not an expression of opinion by this witness.

Exam. Sullivan: Objection overruled.

Mr. Gardner: The supportng facts have already been testified and shown in exhibits in considerable detail.

The Witness: They have, and filed by me in this case.

By Mr. Gardner:

Q. Since you went on the stand?

A. Exhibits 15 and 16, yes sir.

Mr. Hotchner: I object to that and ask that it be stricken out, on the ground that this witness is not competent to express an opinion as to the effect of exhibits, or what they purport to show in the way of policies. The exhibits are [fol. 98e-72] supposed to speak for themselves, not to be characterized by any witness.

Exam. Sullivan: They will speak for themselves, of course, regardless of the witness' opinion as expressed, and inasmuch as it is an opinion and so understood, I will overrule the objection.

Mr. Hotchner: So as not to encumber the record, may I ask that on all of these rulings it be understood that I take an exception, and that you grant one, so that I do not have to interrupt constantly with the word "exception?"

Exam. Sullivan: Yes, I think that will be perfectly satisfactory. It will be understood that all of Mr. Hotchner's objections, which were overruled, that the record will show that his exceptions have been noted.

Mr. Hotchner: And that applies also to counsel for the Transit Commission and counsel for the City of New York?

Exam. Sullivan: Have you authority to speak for them?

Mr. Hotchner: No.

Exam. Sullivan: Then I do not think we should go that far, because they are not here to speak for themselves, but I have no doubt they can take advantage of your exceptions and use them, if they desire.

Mr. Hotchner: That is the understanding we proceed on before the Public Service Commission and the Transit Commission, so that the record would not show a constant flow of the word exception, and I know that they would join in the [fol. 98e-73] motion if they were here.

Exam. Sullivan: We will proceed then along that line, but inasmuch as you have not authority to speak for the other counsel, we will not consider it.

By Mr. Gardner:

Q. In you opinion do these exhibits show that the Long Island Railroad Company is in a position to pay this rental, and it is proper and fair that the company should pay it?

A. It is my opinion that this rental—that the rental we are now asking for in the proposed lease, is a fair rental, and that the Long Island Railroad——

Mr. Hotchner: Just one minute. On the answer to the second part of the question as to whether the Long Island Railroad is in a position to pay the rental proposed in the new agreements, I also object to that on the ground that that is a conclusion to be drawn by the Interstate Commerce Commission.

Exam. Sullivan: He stated in his opinion.

Mr. Hotchner: Is not that the very conclusion that this Commission is asked to draw, and that the opinion of this witness is beside the point, particularly he being an employe?

Exam. Sullivan: His opinion is in for what it may be worth, and the exhibits and record are before the Commission to consider, regardless of the opinion, so that I do not see any particular point in ruling it out.

Mr. Hotchner: Do you overrule it?

Exam. Sullivan: Objection overruled.

[fol. 98e-74] By Mr. Gardner:

Q. Heretofore——

A. Let me finish the other question.

Q. I thought you answered yes.
A. I had not finished.

(Question and answer as above recorded were repeated by the reporter.)

The Witness: It is a fair rental, and in my opinion the Long Island Railroad should pay a proper proportion of the cost of this terminal.

Q. And in your opinion does this agreement provide that it shall pay——

A. In my opinion the agreement requires a fair compensation to the Pennsylvania Railroad by the Long Island Railroad for the use of the terminal.

Q. Heretofore what have been the periods for the duration of these successive trackage agreements or leases?

A. Approximately about a year.

Q. The present agreement provides for a longer term. What have you to say about that?

A. In my opinion we have passed the experimental period with this terminal, and we are now in a position where some permanency should be given to the lease, and for that reason we have asked for a 20 year term.

Mr. Gardner: That is all.

Exam. Sullivan: Does the applicant rest, Mr. Gardner? [fol. 98e-75] Mr. Gardner: Yes, we rest.

Exam. Sullivan: Off the record——

(Informal discussion off the record which was not recorded.)

Exam. Sullivan: I take it, then, gentlemen, there is nothing further for us to do for the present.

Mr. Hotchner: I understand that the answer to your question—your question to Mr. Gardner was answered in the affirmative, that the Long Island Railroad does rest?

Exam. Sullivan: The Long Island Railroad does rest.

Mr. Hotchner: That applies also to the Pennsylvania Tunnel & Terminal Company and the Pennsylvania?

Exam. Sullivan: The applicants in this proceeding rest.

MOTION TO DISMISS

Mr. Hotchner: Now on the grounds made in the motions by the Transit Commission, the Association of Long Island Commuters, and the City of New York here yesterday morning, I again move for a dismissal of the petitions of the three railroad companies, constituting the applicants?

Exam. Sullivan: The motion is denied.

Mr. Hotchner: I have again an exception.

Exam. Sullivan: Exception will be noted.

Is there anything further at this time?

(No response.)

COLLOQUY

Exam. Sullivan: We will take an adjournment of this proceeding until July 15th, at 10:00 O'clock A. M., Standard [fol. 98e-76] Time, at the Assembly Room of the Merchants Association, 9th floor of the Woolworth Building, Broadway and Park Place, New York City.

Mr. Hotchner, I am going to ask you if you will be kind enough to notify Mr. Stover and Mr. Hertzoff of the adjournment, and the time and place of resumption, so that it will not be necessary for the Commission to send out formal notice in the matter.

Mr. Hotchner: May I say this: I understood you yesterday to say that the meeting was to take place here. I understand that you are now changing it.

Exam. Sullivan: I will take care of that. That was the other case.

Mr. Gardner: Now I am going to ask when—my witness, Mr. Fell, cannot be here on the 15th. Mr. Rawson will be here available in either or both cases on the 15th, and I have no doubt that the time will be consumed with Mr. Rawson for the 15th.

Mr. Hotchner: I have a suggestion.

Exam. Sullivan: I presume that will be satisfactory, because we will proceed first with 7353 on the 15th, with the Whitestone branch case, and we will follow the same procedure on the 15th that we followed in the present proceedings, taking up the Whitestone branch case first, and the Pennsylvania Tunnel & Terminal case second.

Mr. Hotchner: Could I add something there? Perhaps [fol. 98e-77] we could take a moment to have our arrangements made here in detail. I was informed last night by representatives of civic groups on the Whitestone Landing branch that they had intended to be here in large numbers, but that they had understood from the newspapers that the hearings were closed, and now that they see that the hearings are open, they want to attend, and these of course are people who go to work during the daytime, and I am wondering, inasmuch as the Whitestone Landing branch case will certainly consume the first day on cross examination, at least, and then a continuance thereafter with the direct examination on behalf of the protestants, and then cross examination by the railroad of the protestants' witnesses, can we save some effort and time by arranging so that the first two days of that week will be devoted to the Whitestone Landing branch abandonment proceeding, instead of expecting people who are interested in one case to attend and hear a matter that they are not particularly interested in. That will apply also to convenience of counsel and to the necessity of ordering the attendance of witnesses in one case to await until the other finishes.

Exam. Sullivan: Well, there should not be any trouble about that, because the Whitestone branch case will come up first. You know now that the Whitestone branch case will come on at 10 o'clock Monday morning, July 15th, and we will run on with that case until we close that hearing. [fol. 98e-78] Then we will take up the case we are just now adjourning. I take it that the Whitestone branch people are not interested in the Tunnel & Terminal case, particularly not so much so as they are in their own case.

Mr. Hotchner: That is right. The latter part of your statement is accurate. They are not so much interested in the rental case as they are in the abandonment proceedings, but the matter of witnesses there, Mr. Examiner, I will be having trouble there—different witnesses in the rental case than in the abandonment proceedings, and it is going to be difficult enough from our standpoint to induce people to give up their time, where they are dependent upon their time for a living, to have them wait unnecessarily. It will be unfortunate.

Exam. Sullivan: All I can do is tell you how we will proceed, and you know of course that you will probably start

upon the resumption of the hearing, with your cross examination of the applicant's witnesses. Then if you have gauged fairly accurately the length of time you are going to take, and have your own witnesses here ready, they can go on and you can start to put in your case immediately afterwards, but I would not want you to put on your own witnesses first before you finish the cross examination of applicant's witnesses.

Mr. Hotchner: I intend to first finish the cross examination, so far as our case is concerned. I cannot speak for [fol. 98e-79] the City or the Transit Commission.

Exam. Sullivan: That is really a matter I am afraid you will have to work out for yourself, and try to gauge the time it is going to take to get through your cross examination and redirect. That probably will take all day Monday, I should judge, and you have your witnesses lined up for Tuesday—some of them at least, or you might have ready one or two for Monday afternoon in the event the cross examination closes ahead of time, but I would not like to be placed in a position of losing time, waiting for witnesses to show up. That is one thing that the Commission is considerably opposed to, being tied up waiting for witnesses to appear, so that I want you to make your arrangements so that you will be able to push right along, without waste of time.

Mr. Hotchner: Now, can I ask Mr. Gardner, when you think that you will be able to let me know as to whether you have copies of the answers to the questionnaire?

Mr. Gardner: I have found out that we have not any additional copies. I made the inquiry after I spoke to you.

Exam. Sullivan: Off the record.

(Informal discussion, off the record, which was not recorded.)

Exam. Sullivan: The hearing stands adjourned.

[fol. 98e-80] (Whereupon, at 10:30 A. M., July 3, 1929, further hearing in the above matter was adjourned until 10 A. M., Standard Time, July 15, 1929, at Merchants Association, Woolworth Building, New York City.)

[fol. 98e-80a]

I. C. C. Finance Docket No. 7308

PETITIONER'S EXHIBIT No. 6

Statement of Amounts Paid by the Long Island Railroad for the Use of the Pennsylvania Terminal, 1911 to Dec. 31, 1928

Year	Joint facility operating expenses	Fixed rental	Rental interest on valuation	Taxes	Rental on power facilities	Credit a/c station concessions	Total	Power	Direct operating charges	Grand total
1911	$183,214	$300,000	.....	.....	.....	$11,567	$471,647	$26,970	$20,556	$519,173
1912	203,454	228,000	.....	$119,516	$15,108	41,590	524,488	45,434	22,428	595,350
1913	223,417	156,000	.....	229,122	26,616	72,241	562,914	52,963	24,118	639,995
1914	214,575	156,000	.....	247,606	29,813	83,789	564,405	63,253	25,821	653,479
1915	266,365	156,000	.....	262,922	31,732	78,141	638,878	26,684	22,875	688,437
1916	305,362	156,000	.....	297,588	32,615	87,443	704,122	27,350	23,735	755,207
1917	375,177	156,000	.....	306,675	33,365	96,377	774,840	50,066	30,370	858,276
1918	549,993	156,000	.....	358,699	34,568	117,899	981,361	60,524	47,810	1,089,695
1919	709,856	156,000	.....	354,931	34,015	137,375	1,117,427	73,171	64,444	1,255,042
1920	886,511	198,000	.....	388,889	36,673	169,969	1,340,104	102,083	67,872	1,510,059
1921	807,370	240,000	.....	540,223	41,153	181,067	1,447,679	103,331	37,533	1,588,543
1922	826,818	270,000	.....	570,640	39,598	254,347	1,452,709	127,483	79,973	1,660,165
1923	626,493	150,000	$595,881	526,951	42,793	112,985	1,829,133	113,602	82,975	2,025,710
1924	350,884	.....	1,199,441	516,449	50,739	.....	2,117,513	116,616	86,039	2,320,168
1925	364,861	.....	1,234,233	516,963	31,898	.....	2,147,955	143,174	95,285	2,386,414
1926	386,365	.....	1,235,194	503,467	*	.....	2,125,026	252,870	104,747	2,482,643
1927	411,579	.....	1,277,764	517,998	.....	.....	2,207,341	203,904	117,771	2,609,016
1928	459,902	.....	1,361,842	550,398	.....	.....	2,372,142	324,416	138,623	2,835,181

Office of Supvr. Divnl. Expenditures,
New York Zone, New York, N. Y.
February 15, 1929—Dept. B.

(*)—Rental on Power Facilities included in cost of Power, effective 9-1-1925.

[fol. 98e-80b] I. C. C. Finance Docket No. 7308

EXHIBIT No. 7

Statement of Passengers Arriving at and Departing from Pennsylvania Station, New York City, on Trains of the Various Railroads Using the Station from January 1, 1911, to December 31, 1928

Year	Pennsylvania Railroad Co.	Long Island Railroad Co.	Baltimore & Ohio Railroad Company	Lehigh Valley Railroad Co.	New York, New Haven & Hartford Railroad Co.
1911....	3,641,567	6,219,859	.....	.....	.....
1912....	4,012,745	7,732,184	.....	.....	.....
1913....	4,371,746	9,629,026	.....	.....	.....
1914....	4,332,764	11,031,845	.....	.....	.....
1915....	4,212,789	11,807,512	.....	.....	.....
1916....	4,912,053	13,224,258	.....	.....	.....
1917....	5,992,288	14,459,259	.....	.....	200,000 [3]
1918....	8,069,251 [1]	15,595,142	427,472 [4]	143,856 [4]	400,000 [3]
1919....	9,998,924 [1]	19,843,205	613,200 [4]	465,520 [4]	400,000 [3]
1920....	11,717,490 [2]	23,440,079	504,065 [4]	525,600 [4]	400,000 [3]
1921....	8,161,337	25,915,259	551,880 [4]	455,520 [4]	400,000 [3]
1922....	8,009,288	28,060,896	230,488	569,820	415,306
1923....	8,429,046	30,892,076	[5]	[5]	455,101
1924....	8,583,255	32,898,590	[5]	[5]	505,301
1925....	9,103,642	39,038,975	303,150	633,255	619,054
1926....	9,765,296	42,200,133	205,134	492,216	644,733
1927....	9,557,517	47,450,243	.....	541,310	575,832
1928....	9,466,909	48,540,920	.....	598,461	531,745

[1] Estimated on account of record discontinued from 11/1/18 to 9/30/19.

[2] From Sept. 1918 to Nov. 1920, Pay and Free Passengers are included in the record.

[3] Estimated on the basis of passengers over Hell Gate Bridge.

[4] B. & O. and L. V. R. R. figures approximated from actual record of passengers on typical days.

[5] L. V. R. R. has no complete record of passengers in and out of Penna. Sta. for these years. No information furnished by B. and O. for these years.

Pennsylvania Station was opened to trains of L. I. R. R.—9/8/1910—P. R. R. —11/27/1910—N. Y., N. H. & H.—4/1/1917—B. & O.—4/28/1918—L. V. R. R. —9/15/1918.

(NOTE.—B. & O. discontinued use of station on August 29, 1926.)

I. C. C. Finance Docket No. 7308

PETITIONER'S EXHIBIT No. 8

Number of Long Island and Pennsylvania Cars In and Out of Pennsylvania Station, 1911 to Dec. 31, 1928

	Tenth Avenue to Sixth Avenue				Sixth Avenue to Harold Avenue			
	L. I. R. R.		P. R. R.		L. I. R. R.		P. R. R.	
Year	Cars	%	Cars	%	Cars	%	Cars	%
1911	228,076	21.90	813,478	78.10	228,076	38.27	367,837	61.73
1912	268,754	23.59	870,439	76.41	268,754	41.51	378,676	58.49
1913	316,030	24.58	969,641	75.42	316,030	42.27	431,572	57.73
1914	361,645	27.60	948,268	72.40	361,645	46.00	424,323	54.00
1915	364,462	28.36	921,427	71.64	364,462	46.62	417,161	53.38
1916	403,487	28.52	1,011,009	71.48	403,487	46.80	458,564	53.20
1917	455,371	28.75	1,128,369	71.25	455,371	46.97	514,114	53.13
1918	484,202	29.09	1,180,803	70.91	484,202	48.07	523,343	51.93
1919	601,896	28.60	1,509,708	71.50	601,896	47.18	673,614	52.82
1920	623,877	28.55	1,561,492	71.45	623,877	46.53	716,527	53.47
1921	697,047	30.96	1,555,080	69.04	693,047	49.50	711,885	50.50
1922	771,609	33.23	1,550,890	66.77	771,609	52.06	710,608	47.94
1923	909,015	36.21	1,601,683	63.79	909,015	55.47	729,804	44.53
1924	988,638	37.08	1,677,785	62.92	988,638	56.19	770,771	43.81
1925	1,099,396	38.25	1,774,604	61.75	1,099,396	57.10	826,068	42.90
1926	1,164,875	38.58	1,854,607	61.42	1,164,875	57.19	872,047	42.81
1927	1,258,227	39.55	1,922,802	60.45	1,258,227	58.11	907,326	41.89
1928	1,370,677	41.44	1,936,754	58.56	1,370,677	59.94	915,947	40.06

In this statement the number of cars includes locomotives, each locomotive being counted as three (3) cars. The total number of cars in each of the two sections is that used in distributing operating expenses, taxes, etc., in accordance with the agreement for the operation of Long Island trains into Pennsylvania Terminal.

Office of Supvr. Divnl. Expenditures, New York Zone, New York, N. Y., February 15, 1929, Dept. B.

[fol. 98e-80d] I. C. C. Finance Docket No. 7308

PETITIONER'S EXHIBIT No. 15

Long Island Railroad

Statement Showing Number of Passengers Carried and Number of Tons of Freight Handled Each Year, 1909–1928, Inclusive

Year	Passengers carried	Tons of Freight handled
1909	27,466,761	3,595,657
1910	30,978,615	3,814,209
1911	33,867,228	3,996,717
1912	37,319,812	4,268,313
1913	40,606,183	4,147,072
1914	41,634,223	4,480,231
1915	42,629,325	4,443,333
1916	45,802,722	5,134,838
1917	50,796,028	5,271,509
1918	55,004,086	5,798,876
1919	64,067,541	5,912,833
1920	72,743,820	5,886,969
1921	75,506,045	5,572,679
1922	79,656,891	6,027,860
1923	86,166,896	7,917,977
1924	92,991,010	7,637,851
1925	100,922,813	8,016,763
1926	104,794,222	9,038,716
1927	111,653,333	8,991,603
1928	112,546,591	8,984,079

(Here follows Petitioner's Exhibit No. 16, side folio 98e-80e.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

[fol. 98f-81]

New York City,
July 18, 1929.—10:00 o'clock a. m.

Met pursuant to adjournment.

Before Thomas F. Sullivan, Examiner, and W. P. Bartel, Director.

APPEARANCES

Same as before.

Additional appearance of:

Hon. Arthur J. W. Hilly, Corporation Counsel, Municipal Building, City of New York, by Vincent Victory, Assistant Corporation Counsel, appearing for the City of New York.

Edward M. Deegan, Assistant Counsel, 270 Madison Avenue, New York City, appearing for the Transit Commission.

Proceedings

Exam. Sullivan: Come to order. This morning we will resume the hearing in Finance Docket 7308, which hearing was adjourned on July 3rd last.

You may proceed, Mr. Victory.

HOBART RAWSON was thereupon recalled as a witness and, having been previously sworn, further testified as follows:

Cross-examination.

By Mr. Victory:

Q. Mr. Rawson, I assume that it has been shown in this record heretofore that there was a proceeding before the [fol. 98f-82] Transit Commission known as case No. 2692, in relation to the agreement of 1922, and also the later agreement of 1925; isn't that so?

A. I think so, yes. I know reference has been made to it. I think that has all been in the record.

Q. There was finally a determination by the Transit Commission approving an agreement, or a substitute agreement, or a substitute agreement for the one which you originally submitted; was there not?

A. Yes sir.

Q. Can you explain the difference between the second agreement which was finally approved and the one which was not approved?

A. The agreement which was not approved provided for the deduction of the interest on the investment, what you call the interest rental, at the rate of four per cent on a car and engine basis. In that case the investment on which the interest was calculated was the investment or cost of the entire property embraced in the station area between 6th and 10th avenues, as well as that between 6th and Harrold avenues, and the Sunnyside yard, all of which is used in part by the Long Island Railroad Company.

When the agreement was finally approved or drafted, there was deducted from the terminal area or station area between 6th and 10th avenues, an arbitrary sum of $15,000,000, which was taken to represent the cost of the station [fol. 98f-83] building above the track level, that is, the station building above the track level was taken out of the investment account.

In the expense of operation and maintenance, the operating expenses and the maintenance expenses of the station were also left out of the expenses which were divided on a wheelage basis.

Those are the main differences between the agreement which was rejected and the agreement which was finally approved.

Q. And the expenses which were left out were taxes?

A. Taxes were also left out.

Q. Cost of insurance?

A. No. Those were specified for convenience. The expenses that were left out were specified for convenience as charges to the I. C. C. maintenance account, station and office buildings, and the I. C. C. operating expense account, station employes and station supplies and expense.

As a matter of convenience, and so as to avoid a great deal of accounting, it was arbitrarily fixed in the agreement that those should be the expenses which were eliminated. There were some other, insurance, and maybe some other expenses of a small nature, which were left in.

Q. Also the cost of lighting?

A. The cost of lighting is included as a charge to station supplies and expenses.

Q. And track crossings?

[fol. 98f-84] A. There are no track crossings.

Q. Still, that was specified in the agreement?

A. I think any protection of crossings is what is specified in the agreement.

Q. What other expenses were specially in that agreement, or under the provisions of that agreement, assigned to the part of the building which you eliminated?

A. I think I have mentioned all of them.

Q. How about watchmen?

A. Watchmen, if they would come in that account, the charges to station employes, in which watchmen around the building would come, they were omitted.

Q. How about heating?

A. That is a charge to station supplies and expenses, and that was omitted.

Q. That was considered as an expense attachable to track area?

A. No, to the building above the track, and that was omitted.

Q. How much was taken as representing that $15,000,000? What was the cost of that part of the building eliminated?

A. That was $15,000,000. That was taken as the cost of that part of the building.

Q. Do you recall how that was made up?

A. That was arrived at from a statement which we prepared showing in some detail the costs of various parts of the property.

[fol. 98f-85] Q. Is there such a statement in this record?

A. Not showing the costs in detail, no.

Q. That $15,000,000 was part of the cost of the building in what was known as Zone 1 in that case?

A. Yes, the station area.

Q. I hand you a paper and ask you if you remember that statement submitted by the railroad company?

A. Yes.

Dir. Bartel: Where was it submitted, in this case?

Mr. Victory: In case No. 2692, before the Transit Commission.

Dir. Bartel: That would not be clear upon this record, to refer to some paper in the other case.

Mr. Victory: I was going to ask him to give the constituent elements that go into that $15,000,000 from this.

Br. Gardner: Was this an exhibit in the other case?

Mr. Victory: Yes.

Mr. Gardner: What was the number of it?
Mr. Victory: 34.
Dir. Bartel: In the case before the Transit Commission?
Mr. Victory: In case No. 2692.
Mr. Gardner: Of the Transit Commission of the State of New York.

By Mr. Victory:

Q. Will you state what the elements of costs are as [fol. 98f-86] stated in that paper constituting the $15,000,000?

A. The item here shown for buildings, station, Manhattan, $14,092,499, plus one half of service plant, Manhattan, which amounted in round figures to $860,000, and in writing the agreement we rounded that out and called it $15,000,000.

Those two items, the station building, which is the station above the track level, plus the one half of the service plant.

Mr. Gardner: Where is the service plant?
The Witness: The service plant is across the street on 31st street, and is used to furnish light, heat, power, et cetera to the station facilities.
Dir. Bartel: Is this $15,000,000 covering station facilities involved in this case?
The Witness: Yes. They are worth a little more, because some additions have been made since that time.
Mr. Victory: May I ask whether it is not proper to stipulate that the Examiners may visit the building and observe all of its parts, the character of the building, et cetera? Are you willing to stipulate that?
Exam. Sullivan: Speaking for myself, I really do not care to see the building. At the Commission we are confined strictly to the facts on the record before us in the handling of any case on which we work. Anything that we may see or know of our own knowledge we cannot use in our reports. So that so far as I am concerned, it really [fol. 98f-87] would be a waste of time for me to go and look at the building. I am not an engineer. I would not know anything about it, so far as the station equipment and facilities and service; and therefore, I really cannot see where anything would be gained by my going.

Dir. Bartel: I have been there.

Mr. Victory: How about stipulating that the Commissioners may personally examine and observe the building?

Dir. Bartel: What Commissioners?

Mr. Victory: The Interstate Commerce Commissioners who would finally pass upon this matter.

Dir. Bartel: They are no better off than we are so far as being confined to the record. The Supreme Court has held that.

Mr. Gardner: The Supreme Court of the United States has expressed its opinion in such a way that I would hesitate to indicate that by any stipulation this record would include something that would be open to criticism.

Mr. Victory: The Supreme Court of the United States has not said anywhere that the judges cannot on stipulation visit the locality and make their own personal observations as to what is there.

Mr. Gardner: I don't think that I would agree with the application of what you say to this case.

By Mr. Victory:

Q. Mr. Rawson, does that paper show the real estate [fol. 98f-88] values in regard to Zone 1, or that portion between 10th and 6th avenues, on which the station stands?

A. Yes, that shows the cost of real estate in Zone 1.

Q. Would you give from that paper, which was made up by the railroad company, what the cost elements of the land are?

A. The real estate is $11,484,551.

The easements, $1,800,796.

Damages, which are land damages, $4,104.

And taxes, which were taxes in the period prior and during construction, and practically all on real estate, $1,429,316.

Those make up what you might say were the real estate elements of the cost of the station zone.

Q. In the investment under that heading in Zone 1, you also have grading, to the extent of what?

A. $7,201,008.

Q. So that these amounts constitute the costs, outside of the cost of the building, do they not, in Zone 1, which is between 10th and 6th avenues?

A. Yes. There are other costs there, such as bridges, track——

Q. Would you read what they are?

A. Bridges, $4,341,283;

Yard, $2,349,054;

Track, $505,441;

Interlocking, that is signals, $863,627;

And some other miscellaneous expenses here totalling [fol. 98f-89] approximately $80,000.

Q. What additions, if you know, have been made to the building and yards since that statement was put in?

A. There have been quite extensive additions made to the building, new waiting room and ticket offices for the Long Island Railroad, additional stairways leading from the Long Island portion of the concourse to the tracks; an extension of the cab driveway out to 8th avenue, and then some stores have been recently added along what was known as the Pennsylvania exit concourse. Those are the principal additions that have been made.

Q. But the main Long Island waiting room has since been eliminated, has it not?

A. The new waiting room was built for the Long Island Railroad, and the old Long Island waiting room was kind of thrown into the concourse.

Q. The new Long Island Railroad waiting room is much smaller in this building than it was when that statement was made up?

A. It is smaller, yes; possibly half the size.

Q. Is it not much less than half in area?

A. Without looking at the print, I should say no, just about half.

Q. And accommodates in seating capacity how much less?

A. Well, I don't think more than about 50 per cent, [fol. 98f-90] maybe less than that.

Q. So that when you say that new waiting rooms were added, you mean that a smaller waiting room was substituted for the larger one?

A. Yes, but you must remember that the old waiting room was also used as a passageway, which was the reason that the change was made, because it was felt that that space was more necessary as a passageway to let the people come through from the subway to the departure concourse lead-

ing to the Long Island trains, and that was all thrown into the concourse.

Q. I hand you exhibit 9. Will you point out on the sheet in exhibit 9, in which the waiting rooms appear?

A. The sheet on exhibit 9 marked in the lower right hand corner D-463/5, shows the waiting room, old waiting room and the present waiting room assigned particularly to the Long Island passengers, all located in the northeast corner of what is known as the exit concourse level, which is the first level above the tracks in the station building. The old waiting room was bounded on the north by a passageway to the subway, which was some 15 feet wide; on the east by the toilets, women's toilet, what is shown here as "Up to subway lobby and the men's toilet"; on the south by parcel room and ticket offices. It extended on the west to a line of columns marked here as "C 29, 2029 and 1929-H."

The new waiting room is plainly marked on this print as [fol. 98f-91] "Waiting room L. I. R. R.," just south of the ticket offices.

Q. And the new waiting room accommodates in seating capacity about 30 persons?

A. I should say about that, yes. Maybe more. They show five benches. Just what the seating capacity of that is, I don't know.

Q. How many ticket offices are there on that level for the Long Island?

A. I don't recall exactly. But looking at the plan here there are seven or eight windows opening into the new waiting room and there are at least that many, if not more, opening into the concourse; so I think there are probably nearly 20 ticket windows.

Q. No ticket offices open into the small waiting room? There is a restaurant there?

A. On this north side there are ticket windows. I counted them here, and there are seven of them.

Q. Those are in the old waiting room?

A. No. An extension was made to the ticket office at that time, and these new ticket windows are opened into the new waiting room.

Q. There is a restaurant in the new waiting room, a bar?

A. What they call a refreshment bar, which is a Savarin bar. That is at the south side of the new waiting room.

Q. There is another one on the north, is there not?

[fol. 98f-92] A. No, those are ticket offices there.

Q. Where is the information bureau?

A. The information bureau is out here. It is marked "Information", right at column 2027 out in the center of the concourse.

Q. Where else is there any other ticket office in that building for the accommodation of the Long Island people?

A. Those are the only ticket offices for the Long Island.

Q. And they are thus situated where you have explained, in that corner of the building?

A. Yes, as a matter of convenience, because all of the Long Island trains, except the race trains and some few special trains, depart from that concourse.

Q. But those are the only ticket offices?

A. Yes.

Q. And the only place for information?

A. There is a main information bureau up in the main waiting room where you can secure information of Long Island trains, as well as of the Pennsylvania.

Q. That is on another level?

A. Yes sir.

Q. That is the Pennsylvania level?

A. Yes.

Q. Where are the stairways which accommodate the patrons of the racing trains?

[fol. 98f-93] A. If you will turn to the next map here or print designated in the lower right hand corner as D-4097/5 you will see that that is a plan of the next higher level known as the main concourse level. In the westerly part of that is the space marked "Concourse", which is the main Pennsylvania departure concourse. The race trains are dispatched from the northern part of this concourse; the passengers on those trains going down the stairways to the trains which are usually sent out on tracks 15 or 16.

Q. Which stairways?

A. The stairways shown here near the western end of that concourse where it says "Down to tracks."

Q. How many stairways are there?

A. There is one stairway which is regularly used; sometimes the next one to it is used, depending upon the track the trains start from.

Q. Whether on track 15 or 16?

A. Yes sir.

Q. Track 15 and track 16 is assigned to the Long Island Railroad exclusively, is it not?

A. Not exclusively, no. It is used in part by the Long Island and in part by the Pennsylvania trains.

Q. It is one of the tracks originally assigned to the Long Island Railroad?

A. No. They are tracks which for many years have been [fol. 98f-94] used partly by one company and partly by the other company, and they are also reached by stairways from the Long Island concourse in the northeast corner.

Q. That is, the racing trains are reached?

A. No, those platforms for tracks 15 and 16 are reached also from stairways over here.

Q. When you say "over here"——

A. In the Long Island concourse.

Q. Do you know what the official area in square feet is of this concourse and waiting room of the Long Island Railroad which you have described?

A. No, I have not calculated that.

Q. Do you know what the cubical contents of the whole building is, the Pennsylvania building?

A. No, I do not recall that. I have not looked at that recently.

Q. You have not figured that out?

A. Not recently, no.

Q. Do you know what the cubical contents is of the whole building which is appropriated to the use of the Long Island Railroad Company?

A. You mean this part over here which we call the Long Island Railroad concourse?

Q. Yes.

A. No, I have not figured that out recently.

[fol. 98f-95] Q. You recall, do you not, that it was proved or shown in the previous case before the Transit Commission, case No. 2692, that it was 1.59 of the whole cubical contents?

A. I don't recall that, no. That may have been so, but I do not remember those figures.

Q. When the Transit Commission in eliminating the $15,000,000 which you have stated, from your investment in connection with that case, it included solely the bare walls of the building, did it not?

A. No, the entire building above the track level, walls and contents and everything that is in it.

Q. But not the foundations or the cost of the excavation which you have described?

A. No.

Q. Solely what there was above the track level?

A. Yes.

Q. When you say the track level, do you mean the actual grade level of the street?

A. No, the level of the tracks. The tracks are some 30 feet or so below the street grade.

Q. And what level is at the grade of the street?

A. The street grade is on the third level which is shown on the print marked D-4098 in exhibit 9. That shows what is at the street level. There are two levels below the street level, the main concourse level and the exit concourse level.

[fol. 98f-96] Q. The known costs amounting to $7,201,008 which you have stated was eliminated?

A. No.

Q. And none of the grading was eliminated?

A. No. The grading was necessary to bring the tracks down to their proper level.

Q. But is it your opinion that the foundations on which the buildings rest, was included in $15,000,000?

A. I don't recall just now whether the foundations of the building columns were included in the $15,000,000 or not. The side foundations, consisting of retaining walls, were not included in it. I don't recall that detail about the column foundations.

Q. According to this statement which you have looked at, the column foundations were not included nor were the foundations of the wall?

A. I am sure the foundations of the wall were not included, but I don't recall about the item of column foundations, whether those were part of the building cost, or whether they came into one of the other items.

Q. Did you have anything to do with the formation of this new agreement?

A. Yes.

Q. As a representative of the Long Island Railroad Company?

[fol. 98f-97] A. Yes.

Q. What position do you hold there?

A. I am a special engineer.

Q. But you are not an officer?

A. No.

Q. Nor on the Board of Directors?

A. No.

Q. What was the part you took in the formation of this agreement?

A. I think I simply, when they wanted to get up a new agreement, they made a draft of it following very closely the lines of the earlier agreement which was rejected by the Transit Commission, and it was given to me to look over and make any comments on.

Q. But did it include, when you got it, the $15,000,000 which had been excluded by the Transit Commission?

A. Yes.

Q. So you don't know who suggested restoring that cost to the investment, do you?

A. No, not who particularly did, no.

Q. Were you asked to determine or find any more practicable and equitable basis for establishing the charges, proper charges, to the Long Island Railroad for the use of this Zone 1?

A. No.

[fol. 98f-98] Q. Did you ever try to work out any more practicable and equitable basis for establishing a fair charge to the Long Island Railroad for the use of this terminal?

A. No, because this seemed to be the most practicable and equitable basis. In previous years we worked out various methods, but among the railroad officials this method appeared to be the most practicable and equitable and simple.

Q. When you say "this method," you mean the method which was originally established and which you call the "use" basis?

A. Yes, and which is embodied in the proposed agreement.

Q. I speak now in regard to this investment. Did you make an attempt and were you not requested, to try to find some more equitable basis whereby the vast costs of these monumental features of this building would be spread over the 12,000 miles of the Pennsylvania system, and not weigh so heavily on the 400 miles of the Long Island?

A. No.

Q. That did not occur to you as a representative of the Long Island?

A. We have been over that ground many years ago, and long ago reached the conclusion that what is embodied in the agreement now proposed is the most equitable and fair to all parties.

Q. Do you think that the Long Island Railroad could from a financial standpoint stand the cost of a vast terminal such as that?

[fol. 98f-99] A. It is not standing the entire cost. It is only standing its proportion of the cost, and I think it could stand its proportion of the cost. It needs such a terminal for its business.

Q. This terminal was originally built for the purposes of the Pennsylvania Railroad and the Long Island Railroad Company, was it not?

A. Yes.

Q. Mainly for the purposes of the Pennsylvania Railroad?

A. Just what the degree for the Pennsylvania Railroad was and what for the Long Island, I don't know. That was planned before my time.

Q. But a very small portion of it was assigned to the use of the Long Island Railroad?

A. A small portion of the facilities above track level were originally assigned to the direct use of the Long Island Railroad. But the Long Island Railroad passengers have always had access, free access, to the entire building, the entire terminal.

Q. How long have you been with the Long Island Railroad Company?

A. Since 1905.

Q. And you have been familiar with its finances since that time?

A. Yes.

[fol. 98f-100] Q. That was before the Pennsylvania terminal was built?

A. Yes.

Q. The financial condition of the Long Island Railroad at that time did not justify the investment of the millions of dollars which the Pennsylvania terminal cost?

A. No. I think it would have been impossible for the Long Island at that time to have invested any such sum of money or to have raised such money for the terminal.

Q. So it could not have been solely for the Long Island purposes?

A. No, I don't think so.

Q. But a vast railroad, one of the first in the United States, was justified in building a terminal such as that, was it not, such as the Pennsylvania Railroad?

A. Well, they thought so. I really don't know whether events have proved that they were or not. There is still some difference of opinion on that.

Q. The Pennsylvania Railroad has about 12,000 miles of trackage, hasn't it, now, of railroad?

A. Something like that, yes.

Q. And the Long Island Railroad only 400?

A. Yes.

Q. And the income from the gross revenues of the Pennsylvania Railroad justified a terminal at that time, did it not, a terminal of that kind?

[fol. 98f-101] A. Well, I imagine that was the thought of the Pennsylvania officials that planned and built it, that the probable increase in passenger revenues which would result from the construction of a terminal on Manhattan Island would justify the large expenditure necessary.

Q. There would accrue to the Pennsylvania Railroad indirectly great benefits from a terminal such as that, which would not accrue to the Long Island, isn't that so?

A. No, great benefits have accrued to the Long Island from the use of the terminal. That is what made the Long Island Railroad, its access to the Pennsylvania station.

Q. That is very true. Benefits have accrued.

A. Yes.

Q. But there are certain indirect benefits which at that time accrued to the Pennsylvania Railroad which did not or would not accrue to the Long Island? I am talking about the indirect benefits?

A. There may be, but I think in proportion the Long Island Railroad has benefited very much more from the terminal than the Pennsylvania Railroad. Look at the growth of the Long Island passenger business as compared with that of the Pennsylvania passenger business into this terminal.

Q. Taking up the passenger business, the Long Island passenger business is simply a Rapid Transit commutation business, is it not?

[fol. 98f-102] A. Largely, yes.

Q. What per cent of passengers of the Long Island are commutation passengers?

A. I think it is something like 70 to 75 per cent.

Q. And that includes all commutation passengers?

A. Yes.

Q. And what is the percentage of revenues from commutation passengers, including 60-trip tickets and 50-trip school tickets, and so on?

A. I think it is about 40 per cent of the passenger revenues, as I recall.

Q. Of the general revenues?

A. Of the total passenger revenues of the Long Island; I think about 40 per cent are derived from the commutation tickets.

Q. There is quite a distinction between the class of traffic that the Pennsylvania accommodates and that which the Long Island accommodates?

A. Yes.

Q. It is a different service entirely, is it not?

A. It is.

Q. As I say, the Long Island is a Rapid Transit suburban service?

A. It is a suburban service.

Q. And it requires mainly platforms for loading and unloading?

A. Yes, and space for people to congregate when they are [fol. 98f-103] waiting for trains and to get down to those platforms.

Q. They require simply a corner such as you have described and set out in this exhibit 9, sheet D-4639/5?

A. Yes.

Q. The Long Island Railroad Company is not in competition with any other railroad on Long Island?

A. No.

Q. It has no competition?

A. Not from other railroads. It has competition from other forms of transportation, but not from other forms of railroad transportation.

Q. But the Pennsylvania has?

A. Yes.

Q. And a terminal such as this would be an advertisement and give publicity to the service of the Pennsylvania, would it not?

A. I think so, yes.

Q. And that is an aid where there is competition in service, is it not?

A. Yes. But the Long Island Railroad, while there is no competition on Long Island, the Long Island territory has to compete with other suburban territory around New York, and there is competition in that way, and the more attractive the transportation from Long Island is made, why the more attractive the Long Island territory becomes as a place [fol. 98f-104] of residence for people, to New York.

Q. I will go along with you to that extent.

A. And in that way there is competition.

Q. The commuters who use to such a vast extent this suburban transportation afforded by the Long Island will have to use that road as a railroad if they are going to use a railroad at all, and they haven't the choice of any other railroad?

A. No.

Q. So that the Long Island has a monopoly of railroad service on Long Island?

A. Yes.

Q. It has an electrified service, has it not?

A. What you might say the suburban part of it is largely electrified.

Q. And what portion of it is suburban?

A. It is electrified out about 40 miles to Babylon on the South Shore; out to Mineola, Garden City and Hempstead, 20 miles in the interior, and to Port Washington, 20 miles on the North Shore. Beyond that it is not electrified.

Q. Beyond that it is mostly a trunk line service, is it not?

A. There is some suburban service performed by steam, such as on the Oyster Bay branch, Wading River branch as far as Huntington and Northport, and to Hicksville and Ronkonkoma, and to Patchogue on the South. That is all suburban service.

Q. So that this suburban service is a commutation service, is it not?

[fol. 98f-105] A. Yes sir.

Q. The patrons of this service are mostly all commuters?

A. In large part.

Q. They go to business in the city in the morning and return in the evening?

A. Yes.

Q. And they rely upon the railroad for that service twice a day?

A. Yes.

Q. And whether you have a terminal costing a million dollars, or a plain unloading and loading platform, they would use your service, would they not?

A. Well, you would have to have adequate facilities, and the track facilities are the important feature. In other words, to handle such service more space is required on the track level than above the track level. There is no doubt of that.

Q. But above the track level there is no necessity for any monumental or architectural structure to attract them; is there?

A. No, I don't believe so.

Q. So that so far as this service is concerned on the Long Island, it is a suburban Rapid Transit service, and the part of the Pennsylvania structure represented by the $15,000,-[fol. 98f-106] 000 of which you speak is not of any benefit?

A. Well, some part of it is. Just how much, I don't know.

Q. What part of it?

A. I would not say. You have the facilities there; a large part of it is on that second level which is needed by the Long Island passengers, those arriving and departing. They are using now and need, with the numbers that come in, some of the other parts of the building. There are trains which are brought in in the morning on the Pennsylvania side of the station because there is no track space to bring them in on the other side.

Q. I am not talking of the track level. I am talking of the value or the benefit of the building represented by the $15,000,000 which you eliminated in your other agreement, to the Long Island suburban commutation passengers.

A. I don't know just what proportion of it or basis would properly be allocated to the Long Island service. But a very substantial proportion is used and is needed for Long Island service.

Q. Let us see what is needed. You need the platform for loading and unloading, or a concourse, as you say?

A. Yes.

Q. You need some ticket offices?

A. Yes sir.

Q. Whether they are elaborate in construction or not, [fol. 98f-107] they must be used, by these suburban commutation passengers?

A. Yes.

Q. That is about all you need, is that not so?

A. You need some provision for waiting room, toilet facilities. While they are not needed, it is a great convenience to the people to have these small stores of various kinds that are located in the station where they can make purchases of various kinds, newsstand, a restaurant is desirable—possibly not absolutely needed.

Q. As a matter of fact, the restaurant connected with this space which you have described appropriated to the Long Island, this concourse and the waiting room and the toilets, are much less elaborate than those on other levels for the Pennsylvania, the accommodation of the Pennsylvania patrons, isn't that so.

A. They are smaller, yes. But, of course, the Long Island passengers have free access to the other facilities.

Q. But these are specially for the Long Island?

A. They are put there for the particular convenience of the Long Island patrons.

Q. And the others are connected with the patrons of the Pennsylvania Railroad?

A. They are nearer and more accessible to the patrons of the Pennsylvania, yes.

Q. What is the nature of the Pennsylvania service?

[fol. 98f-108] A. The Pennsylvania service is almost entirely what we call a through trunk line service. That is, the trains run from the Pennsylvania station to points south and west.

Q. And the Pennsylvania Railroad is in competition with what other roads?

A. The Pennsylvania Railroad is in competition with a great many other railroads.

Q. Will you name them, please?

A. For various points.

Exam. Sullivan: Do you mean reaching into New York?

Mr. Victory: Into New York, competitive into the City of New York.

The Witness: I say from Chicago, in competition with the New York Central, particularly, though there are one or two other roads that run some service to Chicago; St. Louis, with the New York Central and the Baltimore & Ohio; to Washington, with the Baltimore & Ohio, though, as a matter of fact, the Pennsylvania handles almost all, if not all, of the trains from railroads south of Washington coming into New York City, and there are a large number of them.

By Mr. Victory:

Q. From nearer places isn't there the same competition?

A. From Philadelphia, Yes.

Q. How about the southern cities?

A. I say the southern cities——

[fol. 98f-109] Q. Washington?

A. I mentioned that. I say from points south of Washington the Pennsylvania handles I think almost all of the trains, through trains, from points south of Washington on the southern railroads.

Q. How about further north, from Massachusetts and Canada?

A. There are a few trains on the New Haven Railroad which come into the Pennsylvania station. But primarily that service is for connection to the south. They hardly compete directly with the service into Grand Central.

Q. And most of these railroads and some of them with which the Pennsylvania is competing, have large terminals in this city and other cities?

A. Yes.

Q. And these terminals are considered in the case of these great trunk line railroads as bringing indirectly great benefit?

A. I think that the large terminals in many cases are built as the result of pressure on the railroads from the cities. They have a certain civic pride and they like to point to a large railroad station, expensive and elaborate, and I think that there is a great deal of pressure brought upon the railroads to build large and elaborate terminals in cities for that reason. Each city would like to have a better and larger railroad terminal than the next, even though it is not necessary.

[fol. 98f-110] Q. Especially where there is competition between railroads?

A. In a good many cases the railroads use union terminals, even where they are competing lines.

Q. That is very true. But most of the railroads have built their own terminals, that is to say the large competing trunk line railroads, isn't that so?

A. No, I don't know that that is entirely so. At St. Louis there is a union terminal used by practically all the railroads. In Cincinnati they are just going into a project of constructing a union terminal to be used by all the railroads.

Q. There is a tendency now to arrange so that one terminal will accommodate a number of railroads; is that the idea?

A. Yes. In Chicago, while there are several terminals, each terminal I think has several lines.

Q. But that was not so in the years when this terminal was built from 1905 to 1910?

A. Possibly not to the same extent, no.

Q. A terminal like that in your judgment does attract customers or patrons to a railroad?

A. I think so, yes.

Q. And for that reason the monumental and architectural and costly features of a terminal is justified?

A. Yes, I think it probably is.

[fol. 98f-111] Q. Do you know what the total passenger revenue of the Pennsylvania Railroad is today?

A. No, I don't. I don't recall the figures.

Q. Do you know what the total operating revenues are?

A. No, I don't carry those figures of the Pennsylvania in my head. I could make a pretty good guess on the Long Island, but that is about all I can carry.

Dir. Bartel: Do you mean of the system as a whole?

Mr. Victory: Yes. I would like to have it stipulated that the annual reports of the Pennsylvania Railroad from 1900 to date be considered as part of this record.

Dir. Bartel: For what purpose?

Mr. Victory: For the purpose of collecting from them certain data on which we wish to make argument in our brief to this Commission. We want to show, for example, the revenues of the Pennsylvania Railroad; not only the passenger, but the total operating revenue. We want to

make a comparison between the passenger revenue and the total operating revenue of the Long Island and the Pennsylvania Railroad.

Mr. Gardner: We will take any statement prepared from the reports filed with the Interstate Commerce Commission in tabulated form that counsel may prepare, subject to check with the file documents, or, if he chooses to refer to those file documents, I think the rules of the Commission are quite definite as to how he shall do it. I do not feel that [fol. 98f-112] in any event is there any justification for putting in wholesale by general reference extensive documents as has been suggested. If he has some table based upon the figures and document on file, subject to check, they can be put in.

Mr. Victory: Here we haven't time to make the studies and the checks, but we have 30 days after this case is submitted, and we can make these from your reports and make these arguments in our briefs from your reports, and I think it might be stipulated here that all the reports of the Pennsylvania Railroad be considered as part of the record in this case, as well as all reports of the Long Island Railroad Company.

Exam. Sullivan: Is it necessary to go into all of the reports away back to 1900, a matter of 28 years?

Mr. Victory: There are some I would like in 1903. I would like the report of 1928, the latest report. I would also like some reports of earlier dates which show the financial condition of the road during the time of the construction of the Pennsylvania terminal.

Exam. Sullivan: Are you talking about the annual reports actually on file with the Interstate Commerce Commission or annual of the carriers to their stockholders?

Mr. Victory: I will be satisfied with the annual reports of the carrier to its stockholders. They were introduced in the last case and, of course, they are still on record with [fol. 98f-113] the Transit Commission and I could bring them down and have them offered in evidence.

Exam. Sullivan: They would have to go into this record bodily because we have no access to the annual reports of carriers to stockholders.

Mr. Victory: I will ask Mr. Gardner if he will supply the annual reports to the stockholders for the latest report, and also the reports of the Pennsylvania Railroad to its

stockholders for the years 1903, 1904, 1905, 1906, 1907, 1908, 1909 and 1910.

Mr. Gardner: This is the Pennsylvania Railroad's report to its stockholders?

Mr. Victory: Yes.

Mr. Gardner: Haven't you had them in the other case, and aren't they on file with the Commission, except the last two years?

Mr. Victory: I do not belong to the Transit Commission.

Mr. Gardner: They were in the case and they were filed there. I expect that the Transit Commission would allow its files to be used by the Corporation Counsel of the City of New York Things haven't got quite to the state where they would exclude him.

Mr. Victory: If you can, we would like to have them, and if you can conveniently let me have the latest report, I would like that.

[fol. 98f-114] Mr. Gardner: I will be very glad to give you the latest report. But counsel seems to miss the point of my objection. The introduction of these reports wholesale, when he does not know what he is going to prove by them; as a matter of fact, he thinks he may find something. I think that he ought to examine the reports and if he wants any fact that is stated there, presented here, it is an easy matter to do it. I have offered to stipulate in two ways. The record is quite clear and it seems to me that that ought to cover. A shoveling in of these documents in the case wholesale seems to be bad practice.

Mr. Victory: What I want to do is to make a comparison between the passenger revenues of the Long Island Railroad and those of the Pennsylvania Railroad and also the total operating revenues of these companies.

Dir. Bartel: How would that be helpful to us in this case?

Mr. Victory: In this way: It will plainly show the great burden that this cost would be on the Long Island Railroad's small revenue in comparison to the burden it would be on the revenues of the Pennsylvania Railroad.

Dir. Bartel: I don't know as I quite follow you. The Pennsylvania Railroad has other terminals throughout the country, and you are attempting to allocate all their cost to this terminal here.

Mr. Victory: I cannot do that, of course. But in toto [fol. 98f-115] there are the revenues of the Pennsylvania Railroad, tremendous revenues. For example, in 1923 the total passenger revenues of the Pennsylvania were $155,516,000, while those of the Long Island were only $20,732,638.

Dir. Bartel: What conclusion do you intend to draw from that?

Mr. Victory: We took the ratio of the terminal expense to the passenger revenue in both cases, and we want to show that ratio, both in relation to the Long Island and the Pennsylvania.

We showed there that ratio of terminal expense to passenger revenue——

Mr. Gardner: All terminals?

Mr. Victory: No, we are talking about the terminal here—was 13.7 per cent to the Long Island——

Dir. Bartel: Are you taking the entire Pennsylvania revenue and allocating it to the Pennsylvania terminal?

Mr. Victory: I am not allocating to it, but I am making a comparison of these revenues.

Dir. Bartel: Wouldn't it be a fairer comparison to take all their terminal properties, rather than take one, and compare the entire revenue of the entire system to one terminal?

Mr. Victory: That, of course, is you might say a point against the comparison. But still it does show what a great burden this is on the Long Island in comparison to the [fol. 98f-116] burden on the Pennsylvania. In that case the ratio of the terminal expense to the Pennsylvania passenger revenue was only 3.5 per cent.

In relation to the total operating revenues in the case of the Long Island it was 8.3 per cent; while in the case of the Pennsylvania it was 8/10 or 4/5 of one per cent; showing that the Long Island can ill stand such a tremendous expense, while it does not seem to be much of a burden on the Pennsylvania.

Mr. Gardner: The figures are stated now and subject to correction I suppose they state your argument, don't they?

Mr. Victory: Yes.

Mr. Gardner: Well, it is all in.

Mr. Victory: For what year were these figures that you just read?

Mr. Gardner: 1923.

Mr. Victory: Still, I would like to have as part of this record the report of the Pennsylvania Railroad for 1928. I don't know whether the Pennsylvania Tunnel & Terminal Railroad Company makes a report. Does the Pennsylvania Tunnel & Terminal Railroad make a report to the Interstate Commerce Commission?

Exam. Sullivan: They make a report as a lessor carrier, but the chances are it would show little or nothing more than their investment account, or their capital account, [fol. 98f-117] generally. There would be no operating figures at all. The operation is performed by the Pennsylvania.

Mr. Victory: Do I understand Mr. Gardner is willing to submit as part of the record the last report of the Pennsylvania Railroad to its stockholders?

Mr. Gardner: Yes, he will do it now.

Exam. Sullivan: It will go in as interveners' exhibit 17, and it will be understood that counsel will serve copies of this on opposing counsel.

Mr. Gardner: I will supply copies.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 17, No Witness," and is forwarded herewith.)

Mr. Hotchner: I will save everybody the trouble of serving a copy on me.

Dir. Bartel: Can you point out in the 1928 report just what portion of it you want to have considered in this case, or do you want the entire report considered?

Mr. Victory: I haven't had a chance to look at the report yet.

Dir. Bartel: Is the purpose of introducing this to show the same data which you just referred to?

Mr. Victory: Yes. I will just look at the income statement and see.

Exam. Sullivan: The report is in for the purposes you [fol. 98f-118] have described.

Mr. Victory: I would like to refer the Examiners to the passenger operating income of the Pennsylvaina Railroad for the year 1928 which amounts to $131,179,770.81, and also to the total operating revenue of the Pennsylvania Railroad for the year 1928, which amounts to $650,567,316.13.

In relation to the other reports to the stockholders for the years 1903, 1904, 1905, 1906, 1907, 1908, 1909, and 1910, I would like to have those copies in order to show the cost of capital to the Pennsylvania Railroad during those years.

Mr. Gardner: I object to that as irrelevant and not the proper way to prove a particular set of figures.

Mr. Victory: These reports also show the amounts written off during those years to improvements, covering improvements that were unproductive in their nature and charged to surplus, we wishing to show that it was the practice of the Pennsylvania Railroad at that time to construct unproductive improvements out of the surplus earnings of the Pennsylvania Railroad and later charging the amount to surplus.

Dir. Bartel: Would that statement prove that?

Mr. Victory: I will follow that by showing that the Pennsylvania Railroad in connection with the construction of the Pennsylvania Tunnel & Terminal Railroad Company—you understand that the Pennsylvania Tunnel & Terminal Railroad Company is but a subsidiary of the Pennsylvania Rail- [fol. 98f-119] road and through this subsidiary the Pennsylvania Railroad constructed this Tunnel & Terminal. Of course the Pennsylvania Tunnel & Terminal Company issued its evidence of debt to the Pennsylvania Railroad amounting to some $115,000,000 for the whole work, and that later the Pennsylvania Railroad wrote down these indebtednesses to about $56,000,000 and thus charged off to surplus $59,000,000 of the cost of this unproductive improvement.

It will tend to show that this terminal by the Pennsylvania Railroad was considered as an unproductive improvement. They did not expect to get any return directly from it. Their return was to come indirectly. It was to be a monument, in a sense, to the Pennsylvania Railroad System, one of the finest systems in the country and you may go there and see the statue of the president of the Railroad Company in one of the main halls. When you get outside of the Long Island portion, the portion of the space assigned to the Long Island Railroad in this terminal, you will get into the ornate part of the building, the great rotunda, the vast concurse, the great dome, which are of no benefit to the Long Island Railroad Company, but which has brought renown and continues to bring renown and publicity to the Pennsylvania system.

Dir. Bartel: This unproductive property that you are talking about now is the Pennsylvania station?

Mr. Victory: So for that reason I would like to have these [fol. 98f-120] reports in evidence, and, moreover, there is a question of interest which will come up later for the money raised through the Pennsylvania Railroad by the Pennsylvania Terminal & Tunnel Railroad Company, because only about 4½ per cent, so far as the face of the evidence of indebtedness is concerned—of course, Mr. County testified in the last case that certain additional charges for printing, lawyers fees, brought it up to nearer five per cent. But this money was borrowed at four per cent——

Mr. Gardner: I move to strike out these statements of fact.

Exam. Sullivan: What I understand Mr. Victory is doing is, undertaking to justify his request to bring these in. Mr. Bartel asked him the reason why he wanted those in and he is trying to state it. It sounds like argument but, nevertheless, he is simply trying to justify the reason for his request.

Mr. Gardner: He is stating testimony given by a witness in a previous case, and I do not want to be bound by that.

Exam. Sullivan: His statement is not considered as evidence in this case. It is merely his statement of the evidence.

Dir. Bartel: You answered my question.

Exam. Sullivan: Now the situation is, if those reports in 1903 to 1910 show all this data in detail that Mr. Victory has outlined, in view of the contentions made by the protestants, it seems to me it is pertinent matter for this [fol. 98f-121] record. That brings us to the question of whether those reports to stockholders can be produced.

Mr. Gardner: They can be produced. But so far as any matter that he has stated is pertinent, I think that he should point out, refer to the parts of those annual reports that are relevant to this issue, and not put in year afer year all these annual reports.

Mr. Victory: I will be glad to do that right now.

Exam. Sullivan: That point is properly taken. I don't think the entire report should go in and counsel be permitted then to refer to any part of any report with no knowledge to applicants' counsel as to what he is going to cover.

Mr. Gardner: That is the only point I have made since this discussion began half an hour ago.

Exam. Sullivan: That is perfectly proper.

Dir. Bartel: Do you want these other reports for the same purpose as indicated that you want to use the 1928 report for?

Mr. Victory: No. I want to use these reports to show the cost at that time to the Pennsylvania Terminal & Tunnel Company, of the moneys borrowed from the Pennsylvania Railroad for investment in this Tunnel & Terminal; the cost of construction of the terminal property. I can refer to the years and the pages: The report for 1903, page 6;

1904, I do not have the page of that;

1905, page 6;

[fol. 98f-122] 1906, page 6;

1907, page 6;

1908, page 6;

1909, page 7;

1910, page 3.

Exam. Sullivan: When can those reports be brought in?

Mr. Gardner: I think we can get them here tomorrow morning. Mr. Rawson, were not all those reports filed in the office of the Transit Commission in the other case?

The Witness: That is my recollection, that we furnished them at that time.

By Mr. Victory:

Q. Now, taking up the Long Island service, I will hand you a paper and ask you if this refreshes your recollection on the weight and the length and the seating capacity of the Long Island and Pennsylvaina Railroad cars?

Mr. Gardner: Is this an exhibit in the other case?

Mr. Victory: Yes.

Mr. Gardner: What is the number?

Mr. Victory: 32.

The Witness: Yes. This shows the weight of the cars and locomotives; electric locomotives, in service on the Pennsylvania Railroad, and similarly the weight of the cars on the Long Island Railroad. I might add that electric locomotives are also used to haul a few trains of the Long [fol. 98f-123] Island Railroad, and those are the same iden-

tically with the electric locomotives of the Pennsylvania Railroad.

Q. Would you state for the record first, as to the Pennsylvania Railroad Company, state the type of car or locomotive, then the weight in pounds, then the over-all length, and then the seating capacity?

A. Do you want me to read this in?

Mr. Gardner: Why don't you put the document in? Have we got any of those here?

The Witness: I don't think we have any extra copies. I think we have one in our own file.

Mr. Gardner: In view of the fact that Mr. Victory wants to put this in, and we have no copies to let him have to be marked as exhibits, it is only eight or ten lines, and I suggest that it be put into the record.

Exam. Sullivan: Probably that would be the easier and quicker way, to read it right in. Off the record——

(Informal discussion off the record, which was not recorded.)

Mr. Victory: At this point I will offer in evidence the determination of the Transit Commission in case No. 2692, entitled "In the matter of the application of the Long Island Railroad Company and the Pennsylvania Tunnel & Terminal Railroad Company for the approval of an agreement for trackage rights into and the use of the Pennsylvania station in the Borough of Manhattan, City of New [fol. 98f-124] York."

Mr. Gardner: What is the volume and page of the official report?

Mr. Victory: This is volume V of the reports of the Transit Commission of the State of New York, January 1, 1925 to December 31, 1925. This decision appears on page 9 of this book.

Mr. Gardner: I think perhaps Mr. Victory might put all of the opinions in at once.

Mr. Victory: I will also introduce in evidence the opinion of Harkness, Commissioner, concurred in by the other Commissioners, in case No. 2754, entitled "In the matter of the application of the Long Island Railroad Company, Pennsylvania Tunnel & Terminal Railroad Company and the Pennsylvania Railroad for the approval of an agree-

ment for trackage rights into and the use of the Pennsylvania station in the Borough of Manhattan, City of New York," the latter case appearing at page ,64 of this pamphlet.

I further offer in evidence, out of the same pamphlet, the memorandum decision of the Commission in case No. 2782 entitled "In the matter of the application of the Long Island Railroad Company, Pennsylvania Tunnel & Terminal Railroad Company, for approval by the Transit Commission of an agreement dated October 14, 1925 amending the agreement dated January 28, 1925 between the Pennsylvania Tunnel & Terminal Railroad Company, the Pennsylvania Railroad as operating agent for the Tunnel Com-
[fol. 98f-125] pany, and the Long Island Railroad Company, for trackage rights into and use of the Pennsylvania station, Borough of Manhattan, et cetera, so as to provide for a change in rental to be paid by the Long Island Railroad Company effective as of January 1, 1926." That is a third determination by the Transit Commission.

Exam. Sullivan: The volume containing the three decisions mentioned will be received as exhibit 18, it being understood that any reference to any one of these decisions may be made by case number or date.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 18, no witness," and is forwarded herewith.)

Mr. Victory: At this point I think I ought to join with the Transit Commission in a motion here to dismiss this petition on the ground that the Interstate Commerce Commission has no jurisdiction of the subject matter of this petition.

Exam. Sullivan: It won't be necessary to argue that motion, Mr. Victory. You may just make it, and I will overrule it, and you can argue it later. I will deny the motion to dismiss.

Mr. Hotchner: It will be remembered, of course, that the Association of Long Island Commuters not only joined in the motion in the beginning, but made an extensive presentation of the facts.

[fol. 98f-126] Exam. Sullivan: The Association of Long Island Commuters already has made a similar motion.

Mr. Gardner: All the parties joined in that motion, as I recall it, and it was denied.

Mr. Victory: I offer this paper in evidence headed "Containing statistics of passenger train cars and electric locomotives of the Pennsylvania Railroad, Long Island Railroad et cetera."

Exam. Sullivan: That will be received as exhibit 19. In order that there may be no misunderstanding in connection with the acceptance into the record of the decisions of the Transit Commission, it should be understood that those decisions are accepted to show the action taken by the Transit Commission but not as proof of any of the facts contained in those decisions.

Mr. Victory: That is understood, of course.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 19, no witness," and is forwarded herewith.)

By Mr. Victory:

Q. Speaking of the Long Island suburban passenger traffic, it is in the nature of a Rapid Transit service, is it not?

A. Yes, to a certain extent. It differs from a Rapid Transit service in that it is performed on schedule. The trains are regularly scheduled and not run on headway. But you might say it was the next grade above a Rapid Transit Service.

[fol. 98f-127] Q. First, Rapid Transit, then suburban service, and then through service?

A. It is strictly a suburban service, I would say.

Q. And the cars are described as what, motor cars?

A. The cars are made up in a train of what we call multiple units. That is, there are motor cars and trail cars, instead of being a train hauled by locomotives.

Q. The cars are much lighter than those of the Pennsylvania?

A. They are somewhat lighter as is shown by that statement.

Q. I notice that in this statement, exhibit 19, there is no car called a trailer car on the Pennsylvania system?

A. I think that is all included as Pullman car, is it not? Pullman chair car. As a matter of fact, this statement is

not exactly correct at present, because the parlor cars on the Long Island Railroad have been retired since then and the Pullman chair cars operated on the Long Island Railroad for parlor car service, the same as on the Pennsylvania Railroad.

Q. How many of those are there?

A. I think in the summer time there may be 20 to 30 parlor cars in service on the Long Island Railroad at one time. In the winter time not as many.

Q. Between what points?

A. They run between the Pennsylvania station and the Montauk-Greenport division. There may be one that runs [fol. 98f-128] to Port Jefferson or Wading River also.

Q. In the winter time, how many?

A. In the winter time the number is very much less; probably not more than eight or 10.

Q. You say all these parlor cars have been retired?

A. Yes, on the Long Island. At that time the Long Island Railroad operated its own parlor cars. Since then it has made a contract with the Pullman Company and Pullman cars are operated on the Long Island Railroad, and they are identical with the Pullman chair cars that are operated on the Pennsylvania Railroad.

Q. How many of these Pullman cars are in an ordinary train in the summer time?

A. They have one train each day in the summer time which is all parlor cars that will run five or six cars, on week days, and 11 or 12 on Fridays and coming back Sunday night or Monday morning. On the other trains there may be only one or two cars.

Q. None of them are used in what we call the suburban service?

A. No.

Q. Within the electrical zone?

A. No.

Mr. Gardner: They run out of the Pennsylvania station.

The Witness: Yes, but they are not in the strictly suburban service.

[fol. 98f-129] Q. In the agreement of July 28, 1925 which was approved by the Transit Commission, you divided your Pennsylvania property into four sections, did you not,

that is the property of the Pennsylvania Tunnel & Terminal Railroad, did you not?

A. Yes. There we made a separate item of the Pennsylvania station above track level, and one half of the service plant on which we placed the value of $15,000,000.

Mr. Victory: I will ask the Examiners to refer to exhibit 5, to which I refer.

Q. And then the charges for the Long Island Railroad on the investment for rental and taxes and operating expenses were charged on the investment in 2, 3 and 4, isn't that so?

A. Yes.

Q. The investment shown on page 3 of exhibit 5 was stated also in your other agreements subsequently submitted to the Transit Commission, were they not, the same investment?

A. Yes.

Q. But in the investment of the Terminal property in the agreement submitted now dated November 13, 1928, the costs, or the investment has been increased, has it?

A. Yes, some additions and betterments have been made to the property between the time of the two agreements.

Q. What additions or betterments can you give me in figures, and describing them, that have brought this in- [fol. 98f-130] vestment up to the amount stated in this proposed agreement?

A. I think I gave you that sometime ago in quite detail, the additions that have been made to the station building, within the past two or three years, which are between the two agreements.

Q. So that this increased value is due to the improvements in the terminal property in zone 1 between 10th and 6th avenues?

A. Yes.

Q. There has been no change in the approaching tunnels?

A. There may have been a slight change. You can compare the figures there, but nothing substantial. There has been quite a change in the figure for Sunnyside yard, because Sunnyside yard has been enlarged within the past two or three years.

Q. The approaching tunnels in your agreement of 1925, was $32,528,417, and in the proposed agreement is $32,605,521.38.

A. That is not very much of a change, is it?

Q. Not very much. What justification do you offer for the addition to this investment of $15,000,000 which was excluded by the Transit Commission?

A. It is felt that the Long Island Railroad passengers have the use of the entire building and do use it to a certain extent, and that, therefore, the entire investment should be included in the amount on which the interest is calculated, which interest in turn is divided on a user basis.

Q. This user basis is a basis which takes a car as a stand-
[fol. 98f-131] ard unit of measurement, is that it?

A. Yes.

Q. It is sometimes called the wheelage basis?

A. Yes, it is called the wheelage basis.

Q. In order that you may have your calculations correct, based upon a standard of measurement, that standard of measurement must be identical in every case, must it not?

A. Under ideal conditions it would be desirable to have the standard of measurement identical. But as a practical matter that is impossible and we have taken the car as the unit which best reflects the relative use made by the two companies of the station facilities.

Q. What other studies have you made to determine whether there was any other method that would more equitably distribute this charge between the Pennsylvania and the other companies, than the Long Island Railroad?

A. We have made a study, and I think we have offered here a division of the use on a space time basis; that is, use of the track level, which indicates that on a space time basis, the Long Island's proportion of use would be greater than on this car or wheelage basis.

Q. What do you call the space time basis?

A. We introduced it here as one of the exhibits.

Q. I understand that.

A. That is the time element, of time during which cars or
[fol. 98f-132] trains of the different companies occupied the track and platform and yard facilities in the station. That was calculated and the space occupied by each track or platform was calculated.

Q. You did not attempt to establish a basis or make any study on a basis solely of the space occupied, did you?

A. No.

Q. Why not?

A. Well, that was almost impossible because a great deal of space is occupied part of the time by one company and part of the time by the other company.

Q. There could be assigned to the Long Island Railroad a definite space on the track level that would satisfy its uses in these facilities?

A. It might be possible to do that. But as a matter of operating practice it is not done, and it would very seriously restrict the movements of both railroads if you attempted to assign a definite space to each, because there are facilities which can be used by the Long Island to great advantage at morning and night when there are many Long Island trains and which are not needed during the rest of the day, and during the rest of the day, particularly during the late evening, can be used to great advantage by the Pennsylvania.

During the late evening they bring sleeping cars in there and hold them and open them and let passengers come down [fol. 98f-133] and then dispatch them at a little later time, and that space which is used by the Long Island and is needed by the Long Island in the peak hours of the morning and evening, is needed and very valuable to the Pennsylvania in these late evening hours.

It would not be economical or practical to restrict the use of any part of the station to either company exclusively.

Q. A large portion of this space which you say is occupied by the Long Island Railroad during the day time or night——

A. Yes.

Q. Is not necessary to the use of the Pennsylvania Railroad?

A. I am speaking now primarily of the track level.

Q. Yes, of the track level.

A. I think as the study of the exhibit will show, the Pennsylvania uses at various times during the day, and particularly during the late evening hours, all but four tracks in the station, and the Long Island, of the 17 tracks, which the Pennsylvania uses at sime part of the time—to condense that information, the Long Island uses exclusively four out of the 21 tracks; the Pennsylvania uses exclusively six out of the 21 tracks, and the other 11 tracks are used by both companies.

Q. Referring to exhibit 11?

A. Yes.

[fol. 98f-134] Q. While you have that in your mind, will you tell me what tracks in that first column, according to their numbers, are assigned exclusively to the Long Island Railroad?

A. The Long Island uses exclusively, and in that sense there may be said to be assigned exclusively to the Long Island, tracks 18, 19, 20 and 21.

Q. No other tracks exclusively assigned to the Long Island Railroad?

A. No.

Q. Will you mention the tracks that are exclusively assigned to the Pennsylvania?

A. The Pennsylvania uses exclusively, and in that sense it may be said that the tracks are assigned to the Pennsylvania, tracks 2, 3, 4, 7, 10 and 11. There is one Long Island drill movement on track 11, but that is a very small proportion of the total occupancy, only three minutes as compared with 13 hours and 40 minutes for the Pennsylvania.

Q. This exhibit 11 does not show the time occupied by the trains at the station, does it?

A. It does. It shows the time occupied, total time track is occupied, by trains of each railroad.

Q. Take 16 and 17: Are those tracks assigned or used exclusively by either railroad?

A. No. On track 17 there is one Pennsylvania train uses this track, and 52 Long Island trains. That is one of the cases where they bring a train of sleeping cars in in [fol. 98f-135] the early evening, and those sleepers lay there for some time. It is not needed by the Long Island at that time. During the rest of the day it is used by the Long Island.

Q. It appears here, taking that track 16, that 174 cars pass over that track?

A. No, there are 174 multiple unit cars of the Long Island Railroad; 17 baggage; 30 coaches; seven parlor cars, and nine locomotives.

Q. And on track 17, 477 multiple unit cars?

A. 477 multiple unit cars and six baggage cars.

Q. Following that line over the total time occupied by

these Long Island cars is, on track 16, 11 hours and three minutes?

A. Yes sir.

Q. And on track 17, was 19 hours and 28 minutes?

A. Yes.

Q. For 477 multiple unit cars?

A. Yes.

Dir. Bartel: Isn't that exhibit self-explanatory?

Mr. Victory: I don't think it is.

Q. Take the Pennsylvania cars and engines. On track 16, there were eight cars; isn't that so?

A. Eight engines, 27 baggage cars, 17 coaches and 36 Pullman cars.

Q. And they occupied the track for eight hours and nine minutes?

[fol. 98f-136] A. Yes.

Q. So that the proportion of the Pennsylvania cars for the time is very small?

A. I think roughly speaking the Pennsylvania cars on an average occupy the track about twice as long as the Long Island cars.

Q. Take track 17, take your 477 multiple unit cars; they occupied the tracks for 19 hours and 28 minutes, while one engine, Pennsylvania engine, and 10 Pullmans, occupied it for three hours and two minutes?

A. Yes, that is correct.

Q. Isn't that disproportion tremendous?

A. That was a special case. That was where this Pennsylvania train of sleeping cars is brought in there for occupancy at a time when the track is not needed by the Long Island Railroad.

Q. What would you say the time of occupancy was for these 477 cars? What is the smallest time that the Long Island cars occupy a space coming in and going out in commission hours?

A. I think about six trains an hour is about the best we do on any departure platform or departure track. On the arrival tracks, I think they run up nearly as high as 15 trains in the maximum hour for one of the arrival tracks.

Q. In an hour?

A. Yes, that is the maximum hour.

[fol. 98f-137] Q. So that about 60 Long Island trains would come in and out on track 17 while a Pullman car was on the track?

A. A Pullman train. There might be, but there is no demand at that time.

Q. These figures show that that is probably the case?

A. Yes. But at that particular time there is no demand for the Long Island trains to come in and out that frequently.

Mr. Hotchner: Not where the Pennsylvania was using the facilities instead of the Long Island Railroad?

The Witness: Yes.

Mr. Gardner: I think we had better go in an orderly way and finish up with one counsel.

Exam. Sullivan: I think so.

Q. Getting back to the standard of unit which you say is the car, that measuring the charges which ought to be laid on the Long Island, taking the car as the standard of measurement in this case, you haven't got an exact standard, have you?

A. No. I say we haven't got an ideal standard. But that is the most practical and workable standard that we can arrive at.

Q. Taking the motor car, what car of the Long Island is most similar as the standard car used by the Pennsylvania to this motor car of the Long Island?

A. The closest approach to it is the coach. They are both day coaches.

[fol. 98f-138] Q. You have a car then as a standard of measurement on the Long Island weighing 109,000 pounds as against a steel coach weighing 116,000 pounds?

A. If those are the figures, yes.

Q. Those are the figures. And you have a motor car with an over-all length of 64 feet 5¾ inches as against a steel coach with an over-all length of 80 feet 4 inches?

A. Yes.

Q. How can you take such cars as the standard of measurement?

A. Well, as I said before, they are a practical standard. As a matter of fact, your Long Island car will bring into the station two or three or four times as many passengers as the Pennsylvania car. Your passenger density in the

trains is much heavier in the Long Island service than in the Pennsylvania service.

Q. Again taking these two cars as the standard of measurement, you have a seating capacity in the motor car of 70, and a seating capacity in the steel coach of 84?

A. That is true.

Q. A difference of 14 persons?

A. Yes. But the Pennsylvania coaches, you will find that they are very seldom filled, and the Long Island, particularly in the morning and evening, as a matter of fact, are not only all filled, but there are many passengers standing in the cars.

[fol. 98f-139] Exam. Sullivan: We will adjourn now until two o'clock.

(Whereupon, at 12:30 P. M., a recess was taken until 2:00 P. M.)

Afternoon Session, 2:00 p. m.

Hobart Rawson resumed.

Cross-examination continued:

Mr. Victory: May I have that last exhibit showing the trains?

Exam. Sullivan: Yes (hands exhibit to counsel).

Mr. Victory: Thank you.

By Mr. Victory:

Q. Mr. Rawson, I made a reference to the motor car. Now, what car in the Pennsylvania Railroad, operating in the terminal in question here, corresponds to the trail car shown on exhibit No. 19 (handing exhibit to witness)?

A. The passenger coach is the one that corresponds most nearly. In other words, the trail car—Long Island trail car and Long Island motor car are similar as to general arrangement and seating capacity.

Q. You say the steel coach?

A. Yes.

Q. Now, do most of the cars operated by the Pennsylvania into the terminal property consist of steel coaches?

A. No. I think now less than 50 per cent are steel coaches. There are a large number of baggage, mail and

[fol. 98f-140] express cars now, and a large number of Pullman cars.

Q. Now, speaking of the measurement of the use of the cars, of a standard of comparison, or a unit of comparison, would you say that that would apply to a comparison made between the trail car and the steel coach, this trail car of the Long Island Railroad and the steel coach of the Pennsylvania Railroad, the trail car weighing only 67,000 pounds and being 64 feet 5¾ inches long, carrying 80 passengers, with the steel coach which weighs 116,000 pounds, and the over-all length of which is 80 feet 4 inches, and which has a seating capacity of 84?

A. Yes. As I said before, as a matter of fact, the Long Island cars carry on the average many more passengers than the Pennsylvania cars. There is this, too, Mr. Victory, each company has the privilege of using the cars best suited for its class of service, and if the Long Island saw fit, in order to reduce its proportion of expense to operate longer and heavier cars, why, it could.

Q. Do you think the use of the car unit where you are dealing with, say, a trail car and a Pullman sleeper or a Pullman chair car, is a proper unit of standard of measurement of use?

A. Why, yes. In the case of the Pullman chair car, the seating capacity is very much less than that of the smaller and lighter Long Island coach.

[fol. 98f-141] Q. The Pullman chair car weighs 145,000 pounds, and is 82 feet 4 inches long, and has a seating capacity of only 31. Now, that car is in no way similar to the trail car?

A. No, but as I say, it has a much less seating capacity, and it actually carries on an average only probably about one third or one fourth the number of passengers that a Long Island coach will carry into the station.

Q. Well, why should the number of passengers figure in this, Mr. Rawson?

A. Because your revenue is dependent upon the number of passengers.

Q. Yes, but the revenue does not measure the extent of the use?

A. No, but that is the benefit that you derive from the use, is measured from the revenue; isn't it?

Q. That is an entirely different consideration. You are now talking about measuring the use of the Pennsylvania Railroad property?

A. That is very true, and what we are trying to arrive at in measuring that use is to measure the benefit which is derived from the use, the comparative benefit, and the car as a unit affords a simple and real means of doing that.

Q. Well, the passengers—the foot passengers, so to say, would be a better measurement, then, wouldn't it?

A. The passengers might be a fair measurement, but [fol. 98f-142] there again you have a great many cars which do not carry passengers at all, particularly in the Pennsylvania service. They move lots of mail and express and baggage cars into the station.

Q. Now, the Long Island cars are operated more rapidly, are they not, into the terminal property?

A. You mean they stay a less length of time in the station?

Q. Yes.

A. Or at a higher rate of speed?

Q. At a higher rate of speed?

A. No, the Long Island trains accelerate more rapidly, but the maximum speed is about the same.

Q. Have any of the approaching tunnels and track eastward from 6th avenue to Harold avenue, in the Borough of Queens, been assigned to the Long Island exclusively?

A. There are two which are known as tunnels Nos. 3 and 4, which run over to 33rd street; they are used practically exclusively by the Long Island. It is only rarely that a Pennsylvania tunnel—train, runs through those tubes.

On the other hand, there are several Long Island trains which use tunnel tracks 1 and 2 under 32nd street. Those are used to help out during the morning and evening commission hours, when there is a heavy Long Island movement.

Q. It is the most northerly tunnels under 33rd street that are assigned to the Long Island?

A. Yes.

[fol. 98f-143] Q. Now these other tunnels more southerly situated are under 31st street?

A. 32nd street.

Q. 32nd street, and you say they are not exclusively assigned to the Pennsylvania?

A. No.

Q. Now, what proportion of the trains, say, in 24 hours, Long Island trains, use them, also the trains using the 32nd street tunnel?

A. I do not recall offhand the total number of trains in those tubes, but in the morning peak hour, coming into the station, I think about the same number of trains of each railroad use the westbound Pennsylvania tube, or the tube under 32nd street. In other words, in that peak hour the Long Island uses the entire capacity of one westbound tube, and about 50 per cent of the capacity of the other westbound tube.

Q. I see. Now the tubes under 33rd street have substantially reached their capacity, have they not?

A. Yes.

Q. You do not think it would be possible to get any more trains or cars through there?

A. It would be possible to get more trains and cars through the tubes if improvements and changes were made in the approaches at each end, and in the station layout.

[fol. 98f-144] Q. You haven't made any such improvements in the layout in the approaches since 1925, have you?

A. No.

Q. So that the track condition there is about the same as it was in 1925?

A. Yes.

Q. Now, how is it you succeeded in bringing in, since 1925, these additional passengers?

A. By adding cars to trains which already moved through the tunnel, and by carrying more passengers per car.

Q. Well, do you think there is much room for carrying any more passengers in, say, during the commission hours in each car?

A. Oh, in some trains, yes.

Q. In some?

A. There are some trains which are not overcrowded now.

Q. What are the commission hours?

A. Well, they generally figure between 7:30 and 9:30 in the morning, with the maximum hour between 8:00 and 9:00, and between 5:00 and 7:00 in the evening, with the maximum hour between 5:00 and 6:00.

Q. In this proposed agreement there is nothing in relation to any changes to be made in the track layout of the terminal property?

A. No, nothing, except that it provides that interest on additions and betterments shall be divided between the two [fol. 98f-145] companies the same as interest on the present facilities.

Q. Yes. But the Pennsylvania Railroad does not undertake by any provision in this agreement to improve or enlarge any of the facilities in the terminal property?

A. No.

Q. When you considered the formation of this agreement, did you measure the result of it on the income of the Long Island Railroad?

A. We knew in a general way what the result would be, yes, that there would be a substantial increase in the payment which would be made by the Long Island Railroad.

Q. Yes. And that under this wheelage basis, this charge on the Long Island Railroad Company would increase?

A. Yes. Not as a result of the wheelage basis, but as a result of the inclusion of the additional maintenance and operating charges, taxes and investment on the additional property.

Q. But the wheelage basis results in loading on the Long Island an unfair proportion, and an inequitable proportion of these costs?

A. I do not so consider it, no.

Q. Will you mark off on this exhibit, petitioners' exhibit No. 10, the tracks which were originally assigned to the Long Island Railroad, that is, when this terminal was started in 1910?

[fol. 98f-146] A. Well, I do not recall exactly, Mr. Victory, but it is my recollection that when the station was planned it was thought that the Long Island Railroad would make full use of tracks 18, 19, 20 and 21, which are the foremost northerly tracks in the station layout, and partial use of tracks 15, 16 and 17.

Q. Now, what portion of the yard was assigned?

A. The yard on the north side of the main tracks coming in from the west was originally assigned to the Long Island Railroad, and has been used by the Long Island Railroad continuously since the opening of the station.

Q. When you say "north side," do you refer to the north side—of what?

A. The north side of the main tracks leading to the west, indicated on here as Yard B and Yard C.

Q. Yard B is marked on this exhibit by a heavy line, is it not?

A. Well, that is simply a retaining wall that comes in there to mark the different levels.

Yard B extends from 10th avenue up to the latter tracks east of 9th avenue.

Q. And the space between Yards B and A, on this exhibit, is at a lower level than Yard B, is it not?

A. Yes, than Yard B and Yard A. Those are the tracks leading down into the tunnel under the Hudson River.

[fol. 98f-147] Q. Now, isn't it true that the tracks originally assigned to the Long Island, were north of this retaining wall of which you speak?

A. Yes.

Q. And that section assigned to the Long Island Railroad Company continued northerly along a line which would correspond to the prolongation of that wall, would it not?

A. Yes.

Q. That would take it——

A. Well, as I say, yard B, then coming east of 9th avenue, and still further to the north, there is yard C.

Q. Yes. So that yard B and yard C were originally assigned, and that part of yard C, or yard C is north of this track coming in from the west?

A. North of what is known as this latter track.

Q. Latter track. And it was the intention at that time that that yard would satisfy the Long Island's necessities, was it not?

A. It was the thought at that time that it would.

Q. And the balance of the yard was to be completely Pennsylvania?

A. Yes.

Q. Now, have any changes been made in that yard since?

A. There may have been some slight rearrangement of tracks, but nothing substantial.

[fol. 98f-148] Q. Now you say that the Long Island uses today some part of not only these yards B and C, but also some portion of some other yard?

A. It uses practically the entire yard E here, and some of the tracks in yard D, and I think one or two tracks in yard A at certain times. In other words, it uses dur-

ing the day time a considerable portion of the storage space in yards A, D and E on the south side of the station layout.

Q. That is the Long Island trains are laid up there during the day?

A. During the day time, yes.

Q. If they weren't laid up there, where would they have to be taken?

A. They would have to be taken to some point on Long Island.

Q. Sunnyside yard?

A. No, there is no room in Sunnyside yard. In fact, there is no room at Jamaica. They might have to be taken to Port Washington or Rockaway Park.

Q. There is no room in Long Island, for the reason that those yards and the Sunnyside yard, are entirely occupied by Pennsylvania trains?

A. No, there are some Long Island trains. The Long Island trains which are handled by electric locomotives into the Pennsylvaina station from Jamaica, are taken into the Sunnyside yard for storage, and the Long Island uses four [fol. 98f-149] or five tracks in the Sunnyside yard for the storage of those trains during the day time.

Q. The Long Island Railroad owns certain portions of the Sunnyside yard, does it not?

A. Of the land, yes, that is my recollection. When the Sunnyside yard was built, the Long Island right of way ran through what was subsequently the yard, and I think, my recollection is that the Long Island leased that property to the Pennsylvania, and the Pennsylvania, in turn, leased the property occupied by the main tracks of the Long Island as at present located, to the Long Island.

Q. But the Long Island, when the Pennsylvania got control of it, had certain yards there, hadn't it, large yards?

A. No. There was very little yard there. There were simply the tracks coming into the Long Island terminal. The large passenger or coach yard of the Long Island Railroad at that time was between the Long Island City passenger station and Dutchkills Creek on the Montauk division.

Q. Is that used now by the Pennsylvania?

A. No. That is still used by the Long Island for the storage of some of their steam equipment.

Q. And the reason why there isn't space in your Sunnyside yards for Long Island trains is that that yard is necessary for Pennsylvania trains?

A. Yes.

[fol. 98f-150] Q. For cleaning and storage and freight purposes?

A. Not for freight, no. The Long Island has quite a large freight yard there, which adjoins the Sunnyside yard, which is a passenger yard. That is, the classification yard at Long Island City for Long Island freight trains lies right to the north of the Sunnyside yard. In fact, the Long Island, about 1920, leased for this purpose from the Pennsylvania quite a large track of what was originally part of the Sunnyside yard and which was not needed at that time by the Pennsylvania for passenger storage purposes.

Q. The investment in Sunnyside yard is much less than the investment in your yards in Zone 1, is it not?

A. It is less than the investment. I don't know just how it would compare with the investment in the yard portion of Zone 1.

Q. If the Pennsylvania cars did not use the Sunnyside yards, there would be an accommodation there for the Long Island, wouldn't there?

A. Yes.

Q. In this agreement, proposed agreement, there is no direct payment to be made for power, is there; that is, the use of power is to be paid for on a wheelage basis?

A. Yes, power for operating trains in the terminal section.

Q. In the other agreement it was on a car mile basis, was it?

[fol. 98f-151] A. No, it was the same. The power provision is exactly the same in the two agreements. The only difference is that in the proposed agreement the rate of interest has been increased from 4½ per cent to 6 per cent. In all the successive agreements the provision for the payment of power has been the same.

Q. That is, the payment for power is included in the payment of the proportion of the interest and the operating expenses on the power plant?

A. Yes.

Q. And the taxes?

A. Yes.

Q. And in that way the power is paid for?

A. Yes.

Q. Is there any way of measuring the power besides the wheelage basis?

A. Well, it would be possible but very difficult and expensive to put meters on each car or locomotive which would measure the power taken by those cars or locomotives, but that would be hardly practicable, and very expensive.

Q. There could not be placed somewhere one meter that would measure the whole?

A. No, because you see the trains of both the Pennsylvania and the Long Island use the same power facilities. They run over the same tracks, they take the power from [fol. 98f-152] the same third rail.

Q. I see. So that the interest on this investment, and taxes, and the operating expenses, and so far as power is concerned, the proportion which the Long Island will pay of six per cent interest, of value of the distributing system, and also a proportionate part of the taxes and interest on the power plant, will be all measured on the wheelage basis?

A. Yes.

Q. Everything will be controlled by this standard of measurement called the car measurement, is that it, or the car standard?

A. Yes.

Q. Now, this wheelage basis certainly tends to load on the Long Island a large proportion of the costs, an increasing proportion of all these great charges, does it not?

A. No, I don't think so.

Q. As the number of cars and engines that are brought into the terminal are increased, so these expenses will increase?

A. Oh, in that way, yes. As the use of the facilities is increased, why, the amount paid increases.

Q. Then you will have a large number, or this proportion will depend on this condition, where you have a large number of small cars, rapidly moving small cars, into a small space by the Long Island, and a few cars, heavier cars, operating into a larger space by the Pennsylvania, so that [fol. 98f-153] will create an undue proportion of charges, will it not?

A. Are you referring now to the power part, Mr. Victory?

Q. I am referring to the whole thing.

A. To the whole thing?

Q. Which is measured on the wheelage basis, as I understand, which is the proportion of the cars and engines operated by the Long Island Railroad Company to those operated by the Pennsylvania, each engine to be counted as three cars?

A. No, I do not think it throws a disproportionate burden on the Long Island Railroad.

Q. That is your honest opinion?

A. That is my honest opinion, yes.

Q. Is that based on the fact that you think that this is the only practical way of measuring these charges, or the apportionment of these charges?

A. It is based partly on that, yes. As I said before, it may not be the ideal method, but it is the most practical method to get a reasonably correct and accurate result.

Q. Well, it does not give you an accurate result?

A. Not absolutely accurate, no, but it gives you a reasonably accurate result. There are offsetting factors both ways.

Q. As a result of this wheelage basis, the Long Island Railroad, according to exhibit 14, will have to pay—disregarding power for the moment, a credit on account of concessions, and interest, taxes and operating expenses of $4,421,499?

[fol. 98f-154] A. Yes.

Q. Now, with the credit on account of concessions, the Long Island Railroad will pay $3,969,619?

A. Deducting the credit, yes.

Q. And taking the same part of the terminal that is east of 10th avenue, the Pennsylvania Railroad Company will pay, after deducting the credit on account of concessions, $5,180,593?

A. Yes.

Q. About what per cent will that be, do you think, the Long Island Railroad will be paying for these charges of interest, taxes and operating expenses?

A. About 43 per cent.

Q. Is this statement based upon what will take place under the proposed agreement?

A. Yes, this is an estimate of what the Long Island Railroad would have been called upon to pay in the year 1928,

if the proposed agreement had been in effect during the year 1928.

Mr. Victory: I would like to move, Mr. Chairman, to strike out from this exhibit the words at the top which are "On basis of each road bearing its proportion of rental." That is an assumption, you know, that we do not agree to, that this is on that basis. It purports to be on such a basis, but I would not say that it is on the basis of each road bearing its proportion of rental.

[fol. 98f-155] Exam. Sullivan: The motion will be denied.

By Mr. Victory:

Q. Now, those charges will all occur under the wheelage basis, will they not?

A. This is calculated on a wheelage basis.

Q. Yes.

A. Payments on a wheelage basis.

Q. Yes, it purports to show the use of the terminal—what will be the charges for the use of the terminal on your standard of measurement, called the car, is that it?

A. Yes.

Q. Now, take interest. Isn't interest a fixed amount depending more upon the layout, and which does not change with the operation of cars?

A. Absolutely. It is fixed by your facilities, by what you paid for the facilities.

Q. Yes.

A. Your interest would be the same whether you operated one car or a million.

Q. And it doesn't depend upon—it is not changed by any variation in the operation of cars?

A. The total interest, no.

Q. So that if the Long Island Railroad was to bring 20 more cars into the terminal in the next year, the rental would not change any?

A. The interest would not change, no.

[fol. 98f-156] Q. No.

A. But its proportionate use might change, and it seems only fair that it should pay interest on the investment in proportion to its use.

Q. That is, it seems fair to you it should pay in proportion to its use?

A. Yes.

Q. Although the interest is fixed entirely on the layout?

A. Certainly. But isn't it analogous to where you rent space in a building, the landlord has to pay his interest on his investment in his whole building? Now, if you rent one floor you pay so much, if you rent two floors you pay more, according to your use.

By Dir. Bartel:

Q. What do you pay for this use now, Mr. Rawson, based on your existing contract?

A. Yes, we have that on another exhibit here.

Q. I mean is the basis which you are proposing in this new contract different than in the old contract, on the user basis?

A. Well, in the old contract, the present contract, there is omitted from the amount on which interest is calculated this sum of $15,000,000. There are also omitted certain items of the operating and maintenance expenses, and the rate of interest is four per cent in the old contract and six per cent in the proposed contract.

[fol. 98f-157] Q. I mean the basis of adjustment is the same, except that you are figuring on a different amount?

A. That is it, yes.

Mr. Hotchner: But in the agreement up to 1926 there wasn't this wheelage basis. There was for many years just a fixed amount, and the wheelage basis theory was applied only commencing in the year 1926, and perhaps 1927.

Dir. Bartel: Have you finished, Mr. Victory?

Mr. Victory: No sir.

By Mr. Victory:

Q. Now, you were speaking about the rental of property. Now let us take, Mr. Rawson, two apartments, one which rents for $5,000 in which there are two persons, and one which rents for $2,000 in which there are eight persons. The apartment which the two persons rent for $5,000, each person would pay $2,500; isn't that so?

A. Yes.

Q. And in the apartment which is rented by eight persons for $2,000, each party pays $250?

A. Yes.

Q. So you have the fewer persons living in the higher class apartment paying a great deal more than the larger family in the less costly apartment. They pay $250. Now, if you add those together, those rents, which will make $7,000, and divide that by 10, you will find that each party is paying $700, so that the cost of the poorer people who [fol. 98f-158] have been living in the cheaper apartment, per person, instead of paying $250 each, are paying $700 each; is that not so?

A. Well, yes. It is a matter of arithmetic.

Q. Well, doesn't it apply here also?

A. No, I do not think so. That is not a case of joint use. To make it in any way analogous, you would have to throw the two apartments together, all ten people using the two apartments.

Q. Well, substantially you have done this here, you have intense operation by the Long Island Railroad in a small space, and you have this elaborate space with few cars operated by the Pennsylvania Railroad Company. Now if you take and add the costs together and then divide them by the number of cars, isn't there a greater amount loaded over on the Long Island Railroad Company than is justifiable?

A. No, I do not think so.

Q. The same rule would apply as to the apartment?

A. No.

Q. Well, the greater the use, the more intense the use, the less will be the cost per car, will it not?

A. On the whole station, yes.

Q. And where the operation is not so great, you have a greater cost per unit, or per car, is that not so?

A. Yes. In other words, if the total number of cars coming into the station were reduced, the cost per car would be increased.

[fol. 98f-159] Q. Well, if you take these costs and add them together, and then add the number of cars of the Pennsylvania, and also of the Long Island, and divide them into those costs, why you certainly get a larger proportion than should be charged on the Long Island?

A. I cannot follow you that far, no, Mr. Victory.

Q. I believe it has appeared here in the testimony heretofore taken the exact amount that this will charge on the Long Island. What is the total amount that will be charged on the Long Island for all these charges, taxes, operating expenses, a-d including the power?

A. Well, including the power charge?

Q. Yes.

A. The estimated amount which the Long Island would have paid in the year 1928 is $4,452,658.

Q. And what increase would that be over what was paid in 1928?

A. The increase as compared to the present agreement, is $1,617,477.

By Dir. Bartel:

Q. Are these additional facilities included under the present agreement and under the old?

A. The same facilities are, yes.

By Mr. Victory:

Q. What is the additional value, or additional investment, as set forth in this proposed agreement, in comparison with the previous agreement?

[fol. 98f-160] A. $15,000,000.

Q. Nothing more?

A. No. You see the other changes written in the two agreements represent additions and betterments to the property, which have taken place since the earlier agreement, the present agreement, was executed.

Q. Have you, Mr. Rawson, been at work in preparation or preparing matter for a demand on the Interstate Commerce Commission for an increase in commutation rates?

A. Not since our case was decided against us before the Transit Commission. Oh, no. In answer to your question, before the Interstate Commerce Commission, no, I have made no preparation for presenting a commutation rate case to the Interstate Commerce Commission.

Q. Or for the State Commission?

A. Not since the last decision, which was against us.

By Mr. Hotchner:

Q. Pardon me. What was the last part of that, "last decision," what?

A. I said, "which was against us."

Mr. Hotchner: Yes.

By Mr. Victory:

Q. Of course, this great increase in charges against the Long Island Railroad would be part of the operating expenses of the Long Island Railroad and would be considered in a rate case?

[fol. 98f-161] A. Yes.

Q. How is it, Mr. Rawson, that you and an employe of the Long Island Railroad Company, seek to impose or have imposed on that company this great increase in charges?

A. Why, I think it was only fair and just that the Long Island Railroad should pay its fair proportion for the use of the Pennsylvania station.

Q. So it is in a spirit of justice to the Pennsylvania that you moved to——

A. And to the Long Island also. I think the Long Island operations should fully reflect—I mean, the Long Island expenses should fully reflect the Long Island operations, and that there should be included in the Long Island expense of operations a fair proportionate charge for the use of the Pennsylvania station. That is the only way in which the stockholders of the Long Island, the public and all, can tell whether the Long Island is paying its own way or not.

Q. You are not interested in the finances of the Pennsylvania Tunnel & Terminal Railroad, or its lessee, the Pennsylvania, are you?

A. Not directly, no.

Q. You do not make this move because you think that the Pennsylvania Tunnel & Terminal Railroad Company ought to receive a fair return on its investment?

A. Well, I think that that follows with the other, that [fol. 98f-162] any carrier should receive a fair return on its property, and that that fair return should be properly reflected in its accounts.

Q. But you think that an agreement such as this should be very carefully scrutinized where the Long Island is under the complete control of the Pennsylvania?

A. I do not see that that makes any difference in any scrutiny of the agreement.

Mr. Gardner: Well, it is being scrutinized here. That is what it is here for. So the question is irrelevant.

Q. Mr. Rawson, your exhibit No. 7 sets out the increase in passengers arriving at and departing from the Pennsylvania station, New York City, from 1911 to 1928. That exhibit shows that the increase of the Long Island has been very large since 1924, running from 32,000,000 to 48,000,000. Now, do you anticipate any such increase in passengers in the next two or three years?

A. I do not think the increase will continue at quite as rapid a rate. I think there will be some increase, but not at as rapid a rate as in the past.

Q. Those increases will be brought about by loading more people on the cars?

A. Largely, yes. Of course, this statement is the total passengers carried in and out. The limit of capacity is only reached for an hour each day, an hour inbound in the [fol. 98f-163] morning, and outbound at night. There is ample space for additional passengers, additional cars and additional trains at other hours of the day.

Q. But during this high peak, this commission hour you speak of, do you anticipate that it will be possible to bring more people in?

A. Yes, they can bring more in. I think the average cars per train now are a little over 10. All trains can be filled out to 11 and possibly to 12 cars, which will give a certain increase in the number of cars without increasing the number of trains.

By Dir. Bartel:

Q. Mr. Rawson, the question has been in my mind for some time, and if you cannot answer it, probably counsel can. The thing that was going through my mind is this: As I understand it, the present agreement, or the proposed agreement which is here now, covers the same facilities as the previous agreement; that is true, isn't it?

A. Yes.

Q. The only difference being in the rate of interest and the total amount on which a return is to be had?

A. Yes, and certain of the operating expenses which were excluded in the earlier agreement.

Q. Well, why is that agreement brought to the Commission for action?

A. That I could not tell you.

[fol. 98f-164] Mr. Gardner: That is a matter for counsel.

Dir. Bartel: Yes.

Mr. Gardner: I thought you wanted to have that question of jurisdiction argued later on?

Dir. Bartel: No. I had something in my mind that I thought you could probably clear up right now. I do not want to decide the question of jurisdiction now.

Mr. Gardner: You want to hear about it?

Dir. Bartel: Not exactly hear about it. I just wanted to get the basis of it. There is no jurisdiction of lines under paragraph 18 of section 1, is there?

Mr. Gardner: There is no additional line to be constructed or operated, but there is to be a continued operation of the extension to the chartered route of the Long Island. The contract under which that extended operation takes place has expired, and this Commission has the exclusive jurisdiction now, so that for the extension a certificate of necessity must be had from this Commission.

Dir. Bartel: Now, just on that point, Mr. Gardner, the reason I am bringing up this question at this time, is to give all counsel the benefit of what I have, so that they can argue it when they come to the proper time for argument before the Commission, but there has been one case before the Commission in which one carrier operated the tracks of another. The carrier that owned the tracks was sued [fol. 98f-165] for foreclosure, and a new carrier operated the tracks. Under the decree of foreclosure, it had the right to cancel any outstanding agreements, so it elected to cancel the agreement by which the other carrier operated over its tracks.

The other carrier came to the Commission with a formal complaint, and asked that the Commission require that the other carrier permit it to operate over its tracks. The Commission in substance held that before the carrier could abandon——

Mr. Gardner: The certificate had to be cancelled. I am familiar with the case, and I think with all the others. And if you will recall, the dissenting opinion called attention to the fact that it was not necessary to decide under 34 what the Commission could have done or ought to have done, but the prevailing opinion stated that the Commission had jurisdiction under 34 and they were content in that case to rest their conclusion on the determination that the service could not stop, so they said to the carrier, "Go back and make your agreement."

Now, here we have an agreement between carriers in practically a single ownership, and we have determined under the Transportation Act and the Commerce Act, plus the certificate of necessity on an extension, and we are sure the Commission not only has jurisdiction to certify to the extension, but also to pass upon the terms upon which the continued operation is to be had. Because otherwise, in a single ownership, where the parties are agreed, they could [fol. 98f-166] make any terms as to compensation that they choose, and take either horn of the dilemma, and counsel who are claiming that there is jurisdiction are met by this proposition, that the jurisdiction under 320 is exclusive, and jurisdiction under 34 is exclusive, and either we are entirely free, these two corporations, the applicants here, are entirely free to put what compensation they choose in this agreement, or the Interstate Commerce Commission is the tribunal to pass upon it and the only tribunal. So either we are entirely free, or this is the proper tribunal to come to for determination of the compensation.

Dir. Bartel: Is it your thought, Mr. Gardner, that the Commission can fix the basis of compensation for the joint use of terminals, where the Commission has not required the joint use?

Mr. Gardner: Absolutely. As was pointed out in the minority opinion of the case you were on, the first one. Otherwise, you would have the taking of property without due process of law. Why? Because, by refusing the certificate for continuing extended operation there would be compulsory use of the property of one carrier by the other carrier, and no possible way of securing compensation for that use.

Dir. Bartel: Here is what I had in mind, Mr. Gardner. You might see the analogy of it, and it might be a proper

question for argument before the Commission. But under [fol. 98f-167] the interstate commerce act the Commission did not have the power, until recently, to require, for example, the fixation of divisions of joint rates unless the Commission at first prescribed the rate.

Mr. Gardner: Yes, I am familiar with that.

Dir. Bartel: Now, the law has been changed to that extent. The question that bothers me is, has it the right to fix compensation for joint use where it has not required joint use?

Mr. Gardner: Absolutely it has, because under the case you refer to it has compelled us, and to that extent it is a compulsory statute which puts one carrier into the hands of another carrier without any due process of law. A question might arise where there was a dispute between the user and the owner. That was the case which you referred to?

Dir. Bartel: Yes.

Mr. Gardner: And that would be the ordinary case.

Dir. Bartel: And in case of dispute between the owner and user, and in case of one carrier wanting to use the facilities of another carrier, the Commission could require that joint use, and then fix the compensation for the use?

Mr. Gardner: Yes.

Dir. Bartel: I do not care to argue that question. Those are the things that are bothering me, so that they can be discussed in a brief on the question, and in one case where the Commission has the power to require the use of a car- [fol. 98f-168] rier's terminals of operation, in that case, it has the right to fix the compensation if the parties cannot agree.

Now one point I would like to see cleared up is where the parties voluntarily agree to use each other's facilities, and voluntarily agree on the terms, whether the Commission could enter an order?

Mr. Gardner: Most certainly it could, because otherwise we could fix any compensation we like, and if the Commission determines under 215 that this must be continued, then the only due process of law for fixing compensation is under 340. And if we agree, that fact gives us one or two positions: Either we are entirely free to fix compensation and make our own trackage agreement, or this Commission can do that for the public interest.

Exam. Sullivan: Now, from the standpoint of the jurisdiction of the Commission, what is the difference between the situation at the present time and the situation as it existed when this contract of July 28, 1925 was made?

Mr. Gardner: The difference is here, that if your Honor will recall, the extension of the exercise of jurisdiction over trackage agreements in existence for the continued operation, was a slow development in the decisions of the Commerce Commission under 118. There were variations that I won't attempt to enumerate here, but it was not until well along that it was definitely determined that 118 applied [fol. 98f-169] to a case where there had been an existing agreement, or was an existing agreement, and an actual use of tracks, rather than an extension by the building of a new line. First, it was deemed to apply only to an extension where there was a construction of a new line or the acquisition of the right to use a new line never before used by the applicant company. And then it finally was well settled that even if there were expiring agreements where there had been many years of use, nevertheless the Commerce Commission had its jurisdiction to pass upon its terms for the continued use. That has been well settled.

Exam. Sullivan: Is that——

Mr. Gardner: And we were, in our commutation rate case, with the state authorities when this contract, I think, expired the first time, and then the rate case was held up and we had proceedings pending there before. The application of 118 had been clearly defined, and when we finally found that under the extension agreements the exclusive jurisdiction was here, soon after this contract expired, we came here. I daresay we might have come earlier, I don't know.

Exam. Sullivan: I was just wondering if the Commission's pronouncement on that question of jurisdiction over trackage rights was subsequent to or prior to 1925?

Mr. Gardner: Well, there were varied decisions, and I had hoped to put those in in historical sequence in my [fol. 98f-170] formal argument. I can dig them out now, if you want them.

Exam. Sullivan: Oh, no.

Dir. Bartel: Don't put this in the record——

(Informal discussion off the record, which was not recorded.)

Mr. Hotchner: I think it is very, very valuable that these points be brought up so that later on we won't be shooting in the dark.

Exam. Sullivan: This is not the place to bring them up, in the hearing. What we want in this hearing is the facts, but Mr. Bartel had that in his head.

Mr. Hotchner: I am sure we are glad to have them brought up so that we can know something about the views that have been taken and the questions in your minds, so that we can point arguments to those things.

Exam. Sullivan: Have you any further questions, Mr. Victory?

Mr. Victory: Yes. I am going to ask Mr. Rawson some questions which I think he can answer, but if he cannot, why Mr. County will have to come here and answer them. But I guess he can answer them.

By Mr. Victory:

Q. Mr. Rawson, this terminal property was built by the Pennsylvania Tunnel & Terminal Railroad Company?

A. It was actually constructed, as I recall, by two cor- [fol. 98f-171] porations: The Pennsylvania, New York & Long Island, and the Pennsylvania, New York and New Jersey, which were later consolidated into the Pennsylvania Tunnel & Terminal. But during most of the construction period I think there were two separate corporations, one a New York corporation and one a New Jersey corporation.

Q. The Pennsylvania, New York and Long Island Railroad Company was a subsidiary of the Pennsylvania Railroad Company?

A. Yes, both of these corporations were.

Q. Yes.

A. I think for some legal reasons, I think they had one corporation in New York and one in New Jersey for the last part of the construction period.

Q. And the Pennsylvania, New York and Long Island constructed from the center of the Hudson River east, did it not?

A. Yes.

Q. And the Pennsylvania, New York and New Jersey Company west of the center line of the Hudson River?

A. Yes, in the state of New Jersey.

Q. Each within its own jurisdiction?

A. Yes.

Q. Then, later, these two companies, one of which was organized under the laws of the state of New Jersey, and the other under the laws of the state of New York, merged to form a corporation called the Pennsylvania Tunnel & Terminal Railroad Company?

[fol. 98f-172] A. Yes.

Q. Now, the whole construction of this was financed, was it not, through the Pennsylvania Tunnel & Terminal Railroad Company?

A. Yes. Well, through the earlier companies, which were later merged.

Q. And the moneys to construct this terminal property were all advanced by the Pennsylvania Railroad?

A. That was my understanding, yes.

Q. And the Pennsylvania Railroad took evidences of indebtedness, notes or bonds, or whatever they were, from the Terminal Company to secure the repayment of these—as evidence of these moneys advanced to the Terminal Company?

A. Yes, there were some notes and some stock.

Q. Yes. And they amounted to something like $115,000,000?

A. That was approximately the total cost of the project.

Q. Now, later on, the Pennsylvania Railroad Company wrote off a large number, a greater part of this indebtedness, amounting to $56,000,000, did it not?

A. That transaction is something I am not familiar with, and I cannot tell you any more than you can get from these annual reports of the Pennsylvania, where I think you got your information.

Q. What was done will appear in these annual reports?

A. I think so, yes.

[fol. 98f-173] By Exam. Sullivan:

Q. Those reports are not in the record here, though, are they?

A. No. That is what was referred to this morning. I think some Mr. Victory referred to.

Q. Oh, those are the reports to be brought in, between 1903 and 1910?

A. Between 1903 and 1910, yes. I think that is where those statements are shown.

By Mr. Victory:

Q. But what was done by the Board of Directors of the Pennsylvania Railroad Company would not appear in these reports?

A. No, I do not think each individual action. My recollection was that there was just a reference in these reports to that writing off that you speak of.

Q. And that writing off was of about $59,000,000, was it not?

A. Well, my recollection is it was something like that, but I do not know exactly.

Q. In other words, that amount was charged on the books of the company to surplus?

A. Well, I think that Mr. Fell can explain that transaction a good deal better than I can, Mr. Victory.

Q. Oh, there is some one here?

A. Yes, Mr. Fell, vice president, in charge of accounting, is here. He is much more familiar with the details of that transaction than I am.

[fol. 98f-174] Q. I see. And as to all financial matters pertaining to the construction and financing of the properties of the Pennsylvania Tunnel & Terminal Railroad Company, leased to the Pennsylvania Railroad Company?

A. Yes.

Exam. Sullivan: We will take a short recess.

(Short recess.)

Exam. Sullivan: Come to order, please.

Mr. Victory: I do not believe that we have had placed in the record the report for 1928 of the Long Island Railroad to its stockholders, have we?

Exam. Sullivan: No. The Pennsylvania Railroad, but not the Long Island Railroad.

Mr. Victory: I would also like to have the Long Island Railroad latest report.

Mr. Gardner: In this case?

The Witness: You put that in the other case.

Mr. Gardner: Well, we have a copy here?

The Witness: Yes, we have one.

Mr. Hotchner: Are you through, Mr. Victory?

Mr. Victory: I will be in a few moments.

Mr. Hotchner: Oh, excuse me. I thought you stopped, and Dr. Bauer asked me.

By Mr. Victory:

Q. I notice, Mr. Rawson, that in this proposed agreement, there is not specified the method of counting these cars. [fol. 98f-175] A. Not in the same detail as in the present agreement.

Q. Well, I hand you exhibit—exhibit what?

Mr. Gardner: That is the agreement which is before the Commission for approval and is annexed to the petition.

Mr. Victory: And this is the change in it or something?

Mr. Gardner: This is the change, yes. That is the one.

The Witness: The blue book.

Q. Well, I will hand you this proposed agreement, dated November 13, 1928, referred to in your petition, and also petition for leave to amend the application, and ask you what is the difference, if you know; what, I mean, was inserted?

A. Oh, the amendment was a change in the investment or valuation of the property. Well, I think it states here very clearly, "Through an error in assembling and stating the investment as set forth in an agreement bearing date November 13, 1928, the said investment was incorrectly stated, as follows." And it has been correctly restated.

Q. The amounts seem to be about the same.

A. No, there is some difference: $46,015,000 and $46,896,000.

Q. Oh, I see.

A. And in the Sunnyside yard there was quite a large difference. It was simply in drawing the figures off the books originally, clerical errors were made.

Q. I see.

[fol. 98f-176] A. And that has since been corrected, in the petition.

Q. Now, will you point out in the proposed agreement where there is any method described for counting the cars?

A. On page 4 of this agreement it provides that "the division of the interest shall be made as the number of its cars and engines thereon, therein and thereover in each

month shall bear to the total number of cars and engines thereon, therein and thereover during such month, each engine to be counted as three cars."

And further on, on page 4, after paragraph (b) there is a paragraph which says:

"Switching movements between Pennsylvania station and Sunnyside yard, with the exception of movements of engines and cars necessary for the arrangement or makeup of trains in said station or in said yard, shall be included in the above computations."

Q. Yes, but there is no method there for counting the cars going into that portion of the terminal between 10th and 6th avenues?

A. I don't know that it is necessary to set forth any method. They are just counted, that is all, and this provision that I have just read states perfectly definitely that there shall be included in the car account the switching or non-revenue movements between the Pennsylvania station and Sunnyside yard.

[fol. 98f-177] Q. Oh, switching and non-revenue movements?

A. Yes, between Pennsylvania station and Sunnyside yard. That is the movement of the cars and trains from Pennsylvania station to Sunnyside yard for cleaning and storage and back again.

Q. But in your former agreement you recite the number of times the cars were to be counted?

A. Exactly, at the suggestion of the Transit Commission. At that time they felt that the provision that we had was not entirely complete and clear, and suggested the modification. Now, it was the feeling of our people that the language used earlier in the previous agreements, which is used here, fully and completely describes the method of counting the cars.

Mr. Gardner: May I ask him a question?

Mr. Victory: Certainly. Go ahead.

By Mr. Gardner:

Q. There is no change in the method of accounting which has been in use in 1910, when the Long Island first came into this terminal?

A. No, none whatever.

By Mr. Victory:

Q. But show me any provision in that agreement to the effect that a Pennsylvania car must be counted every time it enters and departs from Zone 1, sir.

A. There is nothing that says that definitely, but it is understood that if the switching movements are counted, why, they will be included in the car count. In other words, [fol. 98f-178] this paragraph brings that about.

Q. Well, there is a great deal of switching under that definition of switching or non-revenue movement in connection with the Long Island, is there not?

A. Not to nearly the same extent as the Pennsylvania. That is, in the case of the Long Island, a considerable number of cars are stored in the station area. They are not brought back to Long Island in non-revenue movements for storage. Other Long Island trains come into the station and go right out again as revenue trains. These being multiple unit trains, not having locomotives, they do not have to be switched to the same extent as steam trains do. Also, being short distance trains, they do not require the same cleaning and conditioning, for which there is no space in the Pennsylvania station. So that in the case of the Long Island, the proportion of non-revenue movements of empty cars back to the Long Island is very much less than in the case of the Pennsylvania.

Q. The words in this agreement, "thereon, therein and thereover," refer to that portion of the terminal between 6th and 10th avenues?

A. On to each portion of the terminal in turn.

Q. Now take the portion known as the yards.

A. There are, for the purposes of the agreement, and for the purposes of accounting under the agreement——

[fol. 98f-179] Q. Yes.

A. —the property which is used jointly between the Long Island and the Pennsylvania is divided into three zones, Zone 1 is the station zone, Zone 2 the tunnel, and Zone 3, the Sunnyside yard, and under that provision the cars are counted as they move through each of the zones, and a separate count of cars is made for each zone, and a separate ratio or percentage for the different carriers set up for each zone.

Q. Then the Long Island cars coming into Jamaica, come into zone 3, we will say, the Sunnyside Yard——

A. No, it does not come into the Sunnyside yard at all. The Long Island car coming in from Jamaica comes right in from the Long Island Railroad into the tunnel section, zone 2.

Q. I see, the tunnel section, and crosses the portal at once?

A. Yes.

Q. And then emerges from the other end of the portal, in zone 1, and is counted once more?

A. Not in the tunnel section, no. It is counted once, and goes into the tunnel section in the westbound direction.

Q. Yes.

A. It is then counted again in the section when it goes into the station section.

Q. So that is two counts?

A. Yes, one in each section.

[fol. 98f-180] Q. And then if it remains there long enough to load and rushes out again, it is counted twice again?

A. Yes, once in each section, when it makes the return movement.

Q. And here on this paper, for example, on exhibit 11, on track 17, the multiple unit, the 477 multiple unit cars are counted each four times?

A. No, those cars are some of the cars in and out. They are each counted once in the tunnel section and each would be counted once in the station section.

Q. Yes, coming in they are counted twice, each of those cars, and going out they are counted twice?

A. But the 477 cars, the cars are counted once each way, that is, once in an eastbound train and once in a westbound train.

Q. Coming in zone 1?

A. Yes.

Q. And they are also counted on the outside?

A. That is in the station.

Q. So they are counted twice coming in and twice going out?

A. But in those 477 cars, you would really only have half of them each way, because the cars would come in in a westbound train and be counted once, then. Then you would take another count of the cars when they went back in an eastbound train.

[fol. 98f-181] Q. I cannot——

A. You see in the first column there the trains are numbered eastbound and westbound.

Q. Yes.

A. And the cars are counted in each train.

Q. Mr. Rawson, on this exhibit 11, on track 17, this sixth column has 477 cars under M. U., meaning what?

A. Multiple unit, yes.

Q. They are supposed to have come in, that number of cars, during the time mentioned later, into zone 1?

A. Both come in and go out, as you will see by referring to the previous column.

Q. Come in from where?

A. From Long Island.

Q. Yes.

A. And going out to Long Island points.

Q. Yes. Each one of those cars coming into zone 2 is counted once, isn't it?

A. Not to make up the total of the 477 cars. To make up the total of the 477 cars, some of them are in 52 eastbound trains, and some of them are repeated again in 11 westbound trains.

Q. I see. But each one of them would have to go in and out, wouldn't they?

A. Yes.

[fol. 98f-182] Q. All right. And each one of those, as they went in, would be counted twice, and each one of those, as they went out, would be counted twice?

A. No, they would be counted once as they came in and once as they go out, in the station section.

Q. In the station section, yes.

A. And it would also be counted once as it comes in in the tunnel section, and as it goes out.

Q. Yes. That would be four times?

A. I see. All right.

Q. Each one of those cars would be counted four times?

A. A car on the Long Island coming into the station and going out again would be counted four times.

Q. Yes. Now a Pennsylvania car coming into the station and going out again would be counted twice, coming from the west, and returning west?

A. From the west would be counted once in the station coming in, and if it returned to the west, would be counted

once going out. It would not go into the tunnel section at all.

Q. So these large heavy cars, would be counted twice, coming into the station and going out again to the west, while the Long Island shorter trains and less heavy trains, coming into the station section, would be counted four times?

A. Not in the station section.

[fol. 98f-183] Q. Not in, no, but coming in through the tunnels?

A. No, but I mean as far as the division of the expenses of the station section is concerned, and the number of cars in and out of the station section, a Long Island car coming from the east and going out to the east, the cars in that train would be counted just the same as cars in a Pennsylvania train coming in from the west and going out to the west.

Q. But you have in the case of the Long Island a tunnel section, zone 2, lying between the station section and the field of operation of the Long Island Railroad, which you have not got in connection with the Pennsylvania?

A. No, but you have another tunnel section which is used by the Pennsylvania under the Hudson River, which is not used by the Long Island at all.

Q. That is very true, but that is only used in case of going to the Sunnyside yard?

A. No, the section under the Hudson River is a tunnel section and is used by the Pennsylvania trains coming in from the west.

By Dir. Bartel:

Q. That is not involved in this proceeding?

A. No, that is not involved in this proceeding, but they make use of a tunnel just the same as the Long Island.

Mr. Victory: What is that?

Exam. Sullivan: Traffic moving west from the station on the main line of the Pennsylvania.

[fol. 98f-184] Mr. Victory: Well that traffic is involved here too.

Exam. Sullivan: Under the Hudson River?

Mr. Victory: Yes. They come into the station and moving out of the station they are counted.

Dir. Bartel: They are counted once, but not through the tunnel.

Mr. Victory: Oh, no.

Dir. Bartel: He is making the point that these cars also go through a tunnel, but that tunnel is not involved in this proceeding.

Mr. Victory: Oh, that is very true. That is not involved, my point being that there is a section lying between the counting section here that is not——

Dir. Bartel: I think it is perfectly clear now.

By Mr. Victory:

Q. Now, numerous trains come into the station and deliver their passengers there and then return west without passing through the Long Island tunnels, do they not?

A. A very small percentage of the total.

Q. Well, take all those trains that operate down to Point Pleasant, or Bayhead, and which go to their destination there and return every day a number of times, they all simply come in, or, come into the terminal property and then depart west again?

A. I don't know exactly which trains, Mr. Victory, but if [fol. 98f-185] you will refer to this exhibit showing the number of cars in and out of the station for each railroad for a number of years——

Dir. Bartel: What exhibit is that, Mr. Rawson?

The Witness: Well, I unfortunately haven't got the number on my copy.

Mr. Bauer: Exhibit 11.

The Witness: All right.

Mr. Bauer: This is the one.

The Witness: No, the one with the number of cars.

By Mr. Victory:

Q. Exhibit 8. That is it, exhibit 8?

A. Exhibit 8. You will see that in and out of the station there are 1,936,000 odd Pennsylvania Railroad cars, between 6th and Harold avenues.

Q. Let me see.

A. In 1928.

Q. Yes.

A. The last line (indicating).

Q. Yes.

A. In and out of the station, 10th to 6th avenues, there are 1,936,000 odd Pennsylvania Railroad cars, and between 6th and Harold avenues there are 915,947 Pennsylvania Railroad cars. Now, if you take twice the 915,000 or 916,000 in round numbers, you get 1,932,000 cars. So that on that basis almost all of the Pennsylvania cars must have gone to the Sunnyside yard because——

[fol. 98f-186] Q. What per cent would that be?

A. Well, over 99 per cent of them. Because your total Pennsylvania Railroad cars in and out of the station is only 1,936,000.

Q. And then only half that number go into 6th avenue, or the Long Island tunnels?

A. That is true, but a car makes a through movement through the station.

Q. Well, not according to this, because you have, as you say, 1,936,000 odd cars which go to the portion of the station between 10th avenue and 6th avenue, and you only have 915,000 cars which go to 6th avenue?

A. Yes, but the cars in and out of the station are counted when they come in from the west and then again when they go out to the east.

Q. Yes.

A. So you take a Pennsylvania car coming in from the west, it is counted once in the station zone when it comes in there.

Q. I understand that, Mr. Rawson.

A. All right.

Q. And what I say is only about 50 per cent of the cars of the Pennsylvania Railroad which come into the station property go through the tunnels to Lond Island, as shown by this exhibit?

[fol. 98f-187] A. No. This exhibit shows that—I make a little error there, but, very nearly 95 per cent of them do.

Mr. Victory: I can't make that out at all.

Mr. Bauer: Off the record——

(Informal discussion off the record which was not recorded.)

Mr. Victory: Oh, I see now. The different figure—the figure of the number of cars on the left. I understand it now.

The Witness: All right.

Mr. Victory: I was referring to another figure.

By Mr. Victory:

Q. So that the count, then, is somewhat in favor of the Long Island?

A. Yes.

Q. I mean, somewhat in favor of the Pennsylvania?

A. No, the count is very much in favor of the Long Island.

Q. Well, substantially fewer cars, no matter what percentage, less of the Pennsylvania go through those tunnels than the Long Island. All the Long Island cars, in fact, must pass through those tunnels in their operation?

A. That is very true, but every Pennsylvania car making a movement in one direction through the station and going out to the Sunnyside yard is counted twice in the station?

Q. Yes.

A. Every Long Island car coming in the station and [fol. 98f-188] making a movement just back to the storage yard would be switched and brought back again and counted only once in the station for that movement. So as far as non-revenue movements are concerned, practically all of the Pennsylvania cars are counted twice, and the majority of the Long Island cars are counted only once.

Q. Now, when the Pennsylvania cars go through the tunnels into the Sunnyside yard, are they counted again, going into the Sunnyside yard?

A. That is in the Sunnyside yard section, yes.

Q. Then coming back again into the tunnels, they are counted again?

A. Yes.

Q. Oh, you have six counts, is that it?

A. Well, you have the Sunnyside yard section as well, yes.

Q. I mean from the time of coming in from the west?

A. Yes.

Q. First into zone 1, the terminal property, next into the tunnels, then into Sunnyside yard, which would be three

counts, then coming back from the west, three counts more, is that it?

A. That is it, yes. Two counts in each section—in each of the three sections.

Q. Now, those cars, of course, as we showed, are much heavier and longer, the Pennsylvania cars. Should not [fol. 98f-189] there be some factor added to this count to represent the heavier elements here in these Pennsylvania cars; should they not be counted at 1.35, to represent the 35 per cent greater weight?

A. I do not think so, Mr. Victory, no.

Q. Why not?

A. The heavier weight requires only a small proportionate increase in the maintenance. The heavier weight does not give them any greater capacity for handling passengers —well, that is two reasons.

Q. But they have greater capacity for handling passengers?

A. Well, they do not handle more passengers.

Q. Now how about the consumption of power?

A. As far as the consumption of power is concerned, the Pennsylvania train of, we will say, a locomotive and eight cars, which has a count of 11, does not consume any more power in making the run from the station through the tunnels than the Long Island multiple unit train of 11 cars. We have made tests which indicate that, because the Long Island trains accelerate more rapidly, and that is where in a short run the greater proportion of the power consumption takes place, in the acceleration.

Q. But isn't it a fundamental principle that the power consumed depends somewhat upon the weight of the car, the speed of acceleration being the same?

A. Yes, that is true. There is another element in the [fol. 98f-190] power consumption to the advantage of the Long Island. The Long Island cars are heated by electricity. The Pennsylvania cars are not. They are heated by steam, as they lay in the station or the yards, and there is, therefore, no corresponding consumption of power by the Pennsylvania cars to compare with that electricity which is taken and used in heating the Long Island cars.

Q. But how about the heating of the Pennsylvania by steam?

A. Well, that is not charged as a station expense. That is a direct charge. The steam which is used for heating coaches in the yard, is a direct charge to the company using it, and is not a joint facility charge.

Q. Well, it is not considered in the operating expenses of the property?

A. No, that is it.

Q. How about the lighting of the cars?

A. Well, they are both lighted by electricity. And that takes a very small proportion of the power, anyhow, as compared with the traction.

Q. Now Mr. Rawson, this idea is in my mind. You sought a standard of measurement for the proper apportionment of these fixed charges and operating expenses, both of the terminal property and the distributing system, and so forth, of electricity, and you took the bare car movement, did you not?

Mr. Gardner: I object to this as repetition.

[fol. 98f-191] Mr. Victory: No one moment until I finish.

Q. You took the car as the standard of measurement?

A. Yes.

Q. Now it appears that the cars are entirely dissimilar, dissimilar in size, dissimilar in capacity and dissimilar in weight. Now does it not occur to you that some factor could be added in accounting that would adjust proportionately these differences so as to make a standard car measure?

A. That was one of the things that we have considered many times in the past, and in all our studies we reached the conclusion that it was not necessary to add any such factor in order to make the car count measure the use, that the bare car count, car for car, and one locomotive as three cars, with the operations there as they are, measures the relative use very favorably, if anything, to the Long Island, because of this non-revenue movement of the Pennsylvania station cars to the Sunnyside yards, and because of this heating of the Long Island cars by electricity, and for other reasons.

Q. And that as to the fixed charges, such as interest on property and taxes——

A. Yes.

Q. Which do not change with the change in the number of cars——

A. That is very true, but the relative use by the two parties does change with the change in the number of cars, [fol. 98f-192] and that is what we are trying to measure, the relative use.

Q. Well, why not take a car, assuming—and it is admitted here, is it not, that the Pennsylvania cars, I will say, on an average, are 35 per cent heavier than the Long Island cars?

A. That may be correct. I don't know just the exact percentage. That may be correct.

Q. Could you not adjust this by adding an accounting factor and say a Pennsylvania car is 1.35 of a Long Island car?

A. Of course it could be done, but I do not think it would be as fair.

Q. Well, leaving out the question of heating, would it be fair?

A. No. If the Pennsylvania counted their cars through the station only once instead of twice, why it might be desirable, in the interest of fairness, to put some such multiplier or factor on the Pennsylvania cars, but taking all of the considerations that go into this operation, I believe that this method of counting cars, car for car, is as fair a method as could be devised.

Q. Now, heating is only during a few months of the year, is it not?

A. Yes.

Q. Now, both the Long Island and the Pennsylvania are counted according to this standard method of which you speak, are they not?

[fol. 98f-193] A. Yes.

Q. But you haven't made any difference in the method of accounting in favor of the Long Island, have you?

A. Not since we started, no.

Q. No. It is counted the same way?

A. Yes.

Q. That is to say, every time you count a Pennsylvania car that makes a certain movement, you give the Long Island Railroad cars the same count for the same movement, do you not?

A. Yes.

Q. Well, why shouldn't there then be an adjusting factor?

A. I say because of the nature of the movement, because of the necessity of moving the Pennsylvania cars to Sunnyside yard for storage, and the greater——

Exam. Sullivan: I think you have developed that point as far as you want to, haven't you, Mr. Victory?

Mr. Victory: All right.

Exam. Sullivan: Any further questions?

Mr. Bauer: Just a few questions.

Exam. Sullivan: Go ahead, Doctor.

Mr. Bauer: And if you permit, I want to develop just a little different angle of the same matter, briefly, that Mr. Victory had in mind.

By Mr. Bauer:

[fol. 98f-194] Q. What is the distance of zone 1 from the extreme west end to the extreme east end?

A. Let's see. That is three city blocks, I think that is. No, four city blocks, the long blocks, something 24 or 25 hundred feet, I believe. I don't know whether they are six or eight hundred foot blocks.

Q. Yes. Approximately one half a mile?

A. Yes.

Q. How large a proportion, approximately, of the Long Island trains that come into that station zone go out again, and how large a proportion of them are laid up for more or less time in the yard; just roughly?

A. I was just trying to see if I could give you any degree of accuracy. Well, I should say 75 or 80 per cent of the cars are switched down into the yard and then back again. They may not be laid up at all. And the other 20 to 25 per cent make the return trip right from the platform where they are brought in.

Q. About 25 per cent come to the platform and go right out again, and about 75 per cent are switched down into the yard. Are they all switched clear to the end of the yard, or just part of the way down?

A. Some to the end and some part of the way down.

Q. And the ones that are stored and left there for more or less time, do they go to the end of the yard?

[fol. 98f-195] A. Some of them, and some of them in the storage space.

Q. How far does the yard extend to the west; does the yard extend clear to the western end of the zone, or does it stop short of the western end of the zone?

A. Well, there is part of the yard which extends just to 9th avenue, which is short of the zone, and part to 10th avenue.

Q. Which is the end of the zone?

A. Which is the end of the zone, yes.

Q. As to the Long Island trains that come in and then go right out again from the platform, how far into the zone do they run, that is, the furthermost car, or the engine hauling the car, how far into the zone will it get, at the end of the platform?

A. Well, it will get more than half way through, that is beyond 8th avenue.

Q. About half way or just a little over half way?

A. Yes.

Q. And then it pushes or moves out again?

A. Yes.

Q. Now with respect to the Pennsylvania trains, every train that enters the zone and every car that enters the zone, goes completely through it, does it not, on its way?

A. Yes, a very large percentage, yes.

Q. Well, practically all of them?

[fol. 98f-196] A. Yes.

Q. Practically all of them?

A. Yes.

Q. Now a Long Island car, therefore, that comes on the platform and then goes out again, runs a distance of the total, just about, or only a trifle in excess of the full length of the zone, and is counted twice in the course of coming into the zone and going out; is that right?

A. That is right; yes.

Q. A Pennsylvania car that comes in and traverses the zone, the entire zone, and going over to the Sunnyside yard, is counted only once in the zone?

A. No, it is counted twice in the zone, once when it comes into the zone, and once when it goes out.

Q. That is a point I wanted to make particularly clear, because I felt it was obscure. Take a Pennsylvania car coming in from the west.

A. Yes.

Q. As it comes into the zone it is counted once?

A. Yes.

Q. Is it counted also as it leaves the zone on its way to Sunnyside?

A. It is, yes; in the station zone, yes.

Q. In the station zone it is especially important, to get it clear—and I do not feel certain that I am clear on it—in [fol. 98f-197] the station zone, as that Pennsylvania car comes in, it is counted as it goes over the line into the zone, then it stops, and then as it goes out of the zone on its eastward movement to the Sunnyside yard it is counted again for zone 1?

A. That is correct, yes.

Q. So that it is counted twice for the purpose of your allocation, in traversing its eastward movement?

A. Yes.

Q. Then on its western movement, as it comes into the zone, it is counted twice as it enters on the east side and as it leaves on the west end?

A. That is correct, yes.

Q. I would like to have you look at exhibit No. 8, and take for 1928 the car movements of the Pennsylvania in zone 1, and the movements in zone 2, for 1928. The zone 1 figures are practically twice the zone 2 figures; that is right?

A. Yes.

Q. If the locomotives were climinated?

A. Yes.

Q. Now, in zone 2, the count is once as the Pennsylvania car goes eastward towards the Sunnyside yard; is that right?

A. Yes.

Q. And then once as it comes westward after leaving the Sunnyside yard on its return trip?

A. Yes.

[fol. 98f-198] Q. Hence, in the complete cycle of the movement of this car, the car is counted twice in this zone, isn't it?

A. In the 6th Harold avenue.

Q. That is in zone 2?

A. Yes, it is.

Q. And your figures would confirm, then, your idea that it is counted four times in zone 1?

A. Yes.

Mr. Bauer: Yes. I think that is all. I wanted to ask two or three questions just to clarify the record in regard to exhibit 14.

Exam. Sullivan: Yes.

By Mr. Bauer:

Q. Will you state as definitely as you can the difference between the proposed agreement and the existing agreement with respect to valuation in zone 1. In exhibit 14 the figure is given——

Mr. Gardner: That has all been covered, and I do not think we should go over it again. The Doctor comes in after——

Exam. Sullivan: I think that is already in the record now, Doctor. Haven't you already testified on that, Mr. Rawson?

The Witness: Yes.

Mr. Bauer: Off the record——

(Informal discussion off the record which was not recorded.)

[fol. 98f-199] Mr. Bauer: Just strike out the last question.

Mr. Gardner: Any further questions?

Mr. Hotchner: We would like to put Dr. Bauer on direct. We are ready with Dr. Bauer now.

Exam. Sullivan: Just a moment. Have you any questions, Mr. Gardner?

Mr. Gardner: I have no questions. And I take it that Mr. Fell may now be excused?

Exam. Sullivan: Just a moment. I have a question I want to ask Mr. Rawson before he leaves the stand.

By Exam. Sullivan:

Q. In this contract dated November 13, 1928, on page 4, under sub-paragraph (b), the last sentence refers to items which shall be included in the expenses of maintenance and operation, and then it goes on to say, "and there shall be deducted therefrom receipts received on account of station privileges, concessions and other non-transportation sources."

Now, exhibit 14 shows deductions from concessions, or deductions of receipts from concessions, both from the amounts distributed to the Long Island and to the Pennsylvania. On what basis is that distribution or division of the concession receipts made?

A. That is on the basis of the car and engine account. You see on the bottom of exhibit 14, the percentage for the year is shown, Long Island 41.44 per cent and Penn-
[fol. 98f-200] sylvania and others 58.56 per cent.

Q. The way that sentence there reads indicated to me, as I read it offhand, that the Long Island would secure or receive credit for all of the concession receipts for the entire station; but that is not the fact?

A. No, that is not the fact. All of these sums are divided on a car and engine basis, taxes, rents and everything.

Exam. Sullivan: That is all. Witness excused.

(Witness excused.)

Exam. Sullivan: Is there any cross examination of Mr. Fell?

Mr. Gardner: Now, Mr. Victory said he wanted to ask some questions of Mr. Fell that Mr. Rawson did not have the data concerning, and Mr. Fell is here.

Mr. Hotchner: Well, off the record——

(Informal discussion off the record which was not recorded.)

Exam. Sullivan: Do you want to cross examine Mr. Fell, Mr. Victory?

Mr. Victory: Yes. I was asking him.

Exam. Sullivan: Take the stand, please, Mr. Fell.

F. J. Fell, Jr., was thereupon recalled as a witness and, having been previously sworn, further testified as follows:

Cross-examination.

By Mr. Victory:

Q. What is your name?

[fol. 98f-201] A. F. J. Fell, Jr.

Q. What is your business?

A. Vice president and comptroller——

Exam. Sullivan: Mr. Fell has previously been sworn and examined on direct.

Q. Mr. Fell, you were examined heretofore in this proceeding?

A. I have been, yes, sir, on direct examination.

Q. I do not recall reading your testimony, but have you testified heretofore in relation to the financing of the Pennsylvania Tunnel & Terminal Railroad Company by the Pennsylvania Railroad?

A. I have not.

Q. Do you know the facts and circumstances concerning such financing?

A. I do.

Q. And how was the cost or the moneys necessary to finance the work secured by the Tunnel Company?

A. The entire Tunnel Company operation and construction was financed by the Pennsylvania Railroad Company.

Q. Originally through the New York, Long Island——

A. Through those subsidiaries which afterwards became the Pennsylvania Tunnel & Terminal Company.

Q. Finally what was the amount of the indebtedness against the Pennsylvania Tunnel & Terminal Company held by the Pennsylvania Railroad Company?

[fol. 98f-202] A. The full amount of the indebtedness—there was issued $25,000,000 of capital stock, and the expenditure was about $89,000,000, of which $5,000,000 was forgiven, and a certificate was issued for $84,000,000, a certificate of indebtedness to the Pennsylvania Railroad Company.

Q. Did the Pennsylvania Railroad Company finally hold evidences of indebtedness on account of this work against the Tunnel Company amounting to the sum of $115,000,000?

A. Well, it held, when the financing was completed, it held capital stock to the extent of $25,000,000, and the certificate to the extent of $84,000,000.

Q. To what extent, if you know, was the money obtained used in the construction of the Tunnel Company, obtained by the Pennsylvania Railroad out of its surplus earnings?

A. Well, at that time we did not specifically allocate the receipts from stock or bonds to specific projects. During

the period of construction, the Pennsylvania, of course, issued some bonds and issued some stock.

Q. But the Pennsylvania Railroad Company subsequently wrote off or marked off its books these evidences of indebtedness from about $115,000,000 down to about $56,000,000, or wrote off $59,000,000; is that not so?

A. I will give you the exact figures, Mr. Victory, in just a moment, if I can locate my papers. The certificate of indebtedness was originally for $84,861,000 and was placed [fol. 98f-203] on the books of the Pennsylvania Railroad Company at $57,461,000.

Q. Well, as a result of that, wasn't there a certain amount charged to surplus?

A. There was charged to surplus the difference.

Q. What was that?

A. Well, that aggregated $27,000,000.

Q. Did the Pennsylvania Railroad Company not charge other parts of the cost of this terminal to surplus?

A. Oh, the cost of the terminal was charged to the capital accounts of the Pennsylvania Tunnel & Terminal Company. The certificates of indebtedness issued for that were reduced by the Pennsylvania Railroad through the charge to surplus.

Q. Well——

A. Differentiating between the cost of the property and the security.

Q. Yes. Have you anything among your papers to show about what the financing charges of obtaining money by the Pennsylvania Railroad from 1905 to 1910, cost?

A. Well, at the time that the previous case was heard, of course, the Pennsylvania during that time issued some stock and issued some bonds.

I think Mr. County testified in the previous case that the cost was approximately 4.77, and after taking in certain ex- [fol. 98f-204] penses, it ran around five per cent. Since that time, however, the Pennsylvania Railroad has increased its dividend from six to eight per cent which, of course, naturally increased the cost of the money.

Q. Well, increasing your dividends did not increase the cost of the interest on the bonds?

A. No, but it increased the dividend payments on the stock that was issued during that period.

Q. How much does the stock amount to?

A. Well, that brings it up to about 6½ per cent.

Q. No, how much stock?

A. Well, in 1923 we issued $75,000,000 of stock. In 1909 we issued $82,000,000 of stock. Then we issued some convertible bonds which were convertible into stock. The only change in the calculation which I have made over that given by Mr. County is that we have increased the rate of dividend from six to eight per cent, which makes the total figure 6.5.

Q. You cannot testify that the amount of money raised from the sale of stock by the Pennsylvania Railroad was used in the construction of this terminal company?

A. I did not say that. I said that we did not at that time allocate the money received from the sale of stocks and bonds to specific projects. You asked me for the money raised in that period, and I am giving it to you.

[fol. 98f-205] Q. Mr. County in the former case testified that the Pennsylvania Railroad Company had marked off or paid to surplus $59,000,000 of the cost of the terminal; is that correct?

A. That is about correct. It is about $27,000,000 on account of the certificate, and then the stock was marked down.

Q. And in the opinion of the Transit Commission here I find the following:

"Some years ago the Pennsylvania Railroad Company tacitly admitted that a portion, at least, of the cost of this great terminal was an unproductive expenditure, and wrote down the securities taken from the Tunnel Company in return for the money invested therein, from the sum of $115,000,000 to $56,000,000, thus writing off $59,000,000."

Is that statement by the Commission about correct?

A. What case is that, please?

Q. That is the——

A. Which case?

Q. Case No. 2692. It is the opinion of Mr. O'Ryan.

A. But they made another statement in case No. 2754 on that same question which I think should enter into whatever is said here about that particular thing. They said in that case that whether the Pennsylvania wrote it down or not had no legal status in the matter at all.

Q. That is a question for the Commission, of course. [fol. 98f-206] But, however, that statement is substantially correct?

A. Very correct, yes.

Q. And it was the practice at that time to charge to surplus many unproductive improvements, was it not, of the railroad?

A. I do not consider this as an unproductive improvement.

Q. It isn't today, but at that time it was considered as an unproductive improvement, was it not?

A. Well, the Pennsylvania assumes a very conservative policy in respect to the carrying of its assets, and it was in pursuance of that rather conservative plan that the securities were written down.

Q. Now in your report for 1905, at page 6, there is a charge—have you got any reference to a charge to surplus of something like $5,000,000 on account of unproductive improvements by the Pennsylvania, or have you any record of these at that time?

A. I have a record, but I would not call it an unproductive improvement. I would like to see the report and see what the report states.

Q. I see. Now, where you charged off from your books a large sum of money and charged it to surplus, or under the designation of "extraordinary expenditures," didn't those words generally cover unproductive improvements, that is, improvements from which you did not expect any return?

A. Not necessarily.

Q. What?

[fol. 98f-207] A. Not necessarily.

Q. Well, generally?

A. No, not necessarily.

Q. No, not necessarily, but ordinarily it did?

A. No, I would not say ordinarily. That was only in pursuance of the general plan of the conservative handling of our assets that we did those things.

Mr. Victory: That is all.

Exam. Sullivan: Any further questions?

(No response.)

Exam. Sullivan: Witness excused.

(Witness excused.)

Exam. Sullivan: Now, where is Mr. Hotchner?

Mr. Garner: While we are waiting for counsel, I will hand the 1928 annual report to stockholders, which was asked for—I forget who asked for it.

Exam. Sullivan: This is the Long Island Railroad?

Mr. Gardner: The Long Island Railroad.

Exam. Sullivan: That will be received as exhibit 20, and marked.

Mr. Gardner: Well, wasn't he going to refer to something? Was he going to put the whole thing in?

Exam. Sullivan: No. That was only for the income account statement.

Mr. Gardner: He can put anything he wants in, only I [fol. 98f-208] did not understand it.

Exam. Sullivan: That was my understanding, that it would go in for comparison of the income account statement in the report of the Pennsylvania Railroad to its stockholders for 1928.

Mr. Victory: Yes.

Mr. Gardner: Yes. Well, I have no suggestion or objection, only I produce the paper and whatever he wants to put in of it he can.

Mr. Victory: What I would like to do with it is to refer—in making up my memorandum I might want to refer to some of the data from this report, which is undoubtedly correct, and that is why I would like for it to be left open.

Exam. Sullivan: That is contrary to the Commission's rules, Mr. Victory, unless counsel will agree to just put the report in and allow the opposition to refer to anything and everything in it.

Mr. Gardner: What is he afraid of, that it will bind him?

Mr. Victory: No, no.

Exam. Sullivan: Mr. Victory says that he would like to have more leeway, as he might like to refer to other statements in this report, and I told him that my understanding is that the report is placed in evidence solely for comparative purposes, and for the same purposes as the Pennsylvania report for the same year.

[fol. 98f-209] Mr. Gardner: I have not put it in, nor any part of it. I was asked to produce it because he wanted to put it in, or some part of it.

Mr. Victory: Then I will offer the report in evidence.

Exam. Sullivan: Yes. That will be interveners' exhibit No. 20.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 20, no witness," and is forwarded herewith.)

Mr. Gardner: And here are the Pennsylvania Company's annual reports from 1903 to 1910, inclusive, which were asked for, and which Mr. Fell sent to Philadelphia and got since they were asked for this morning.

Exam. Sullivan: Do you desire to introduce those, Mr. Victory?

Mr. Victory: Yes.

Mr. Gardner: The whole thing, all of them?

Mr. Victory: Yes.

Mr. Gardner: Well, I objected to that before and I repeat my objection. What is it you are showing?

Mr. Victory: Oh, in reference to bond issues, that is all.

Exam. Sullivan: Now, to just what portion of these reports do you desire to refer?

Mr. Victory: The portion with reference to the securities of the company, and the issue of securities during that [fol. 98f-210] time.

Exam. Sullivan: Yes.

Mr. Victory: Where are these going to remain?

Exam. Sullivan: They are going into the record, Mr. Victory, and the reporter will take them with him.

Mr. Victory: Yes.

Exam. Sullivan: Now, they naturally will be sent to Washington, in the regular course.

Mr. Victory: I believe they are up now as part of the records in the old case at the Transit Commission, and I will be able to get them up there.

Exam. Sullivan: Well, that will be satisfactory.

Now, these reports, for the purposes stated, will be received as follows:

Report for 1903 will be received as exhibit 21;

1904, as exhibit 22;

1905, as exhibit 23;

1906, as exhibit 24;

1907, as exhibit 25;

1908, as exhibit 26;

1909, as exhibit 27; and
1910, as exhibit 28.

(The same were thereupon received in evidence, marked "Interveners' Exhibits Nos. 21 to 28, inclusive," and are forwarded herewith.)

[fol. 98f-211] Exam. Sullivan: Can you finish tonight?
Mr. Hotchner: Off the record——

(Informal discussion off the record which was not recorded.)

Exam. Sullivan: We will adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 4:35 P. M., July 18, 1929, further hearing in the above matter was adjourned to July 19, 1929, at 10:00 A. M.)

[fol. 98f-212] New York City,
July 19, 1929, 10:00 o'clock A. M.

Met pursuant to adjournment.
Present: Same as before.

Exam. Sullivan: The hearing will come to order.

Hobart Rawson was thereupon recalled as a witness and, having previously been sworn, further testified as follows:

Cross-examination.

By Mr. Bauer:

Q. Have you exhibit No. 11, Mr. Rawson?
A. Yes.
Q. Are all the tracks that are used in zone 1 included in this exhibit?
A. All of the station tracks.
Q. That is what I mean?
A. Yes. There are in addition to those, yard tracks.
Q. The tracks are numbered consecutively, 1 up to 21?
A. Yes.
Q. A total of 21 station tracks serving platforms for loading and unloading?

A. Yes, and they are further identified by the same numbers on the plans which we introduced as another exhibit.

Q. The numbers start, am I correct, on the south side of the station?

A. Yes.

Q. And run consecutively to the north?

[fol. 98f-213] A. Yes.

Q. The tracks used exclusively by the Long Island are, therefore, on the north side?

A. Yes, on the north or 33rd street side.

Q. Take track No. 21: where is its physical location?

A. That is the most northerly track. It is, I think, partly under 33rd street. It is away at the north end.

Q. Under 33rd street?

A. Yes sir.

Q. And then how much space further north is there beyond track 21 extending under 33rd street?

A. There is no space on the track level beyond track 21.

Q. Where is the final wall?

A. That is just beyond track 21.

Q. That is about near the curb on the north side of 33rd street?

A. Yes, I think so. That is shown on the plan quite plainly.

Q. In operating the Long Island trains into tracks 21 to 17, inclusive, and running them out, what would be the normal mode of operation? Take the trains that come in and then run out again; about what is the mode of operation?

A. The normal mode of operation, the trains coming in on tracks 20 and 21 run down back in the yard, are tail-switched and then come out and depart from 17, 18 or 19. In addition to that, trains coming in on 17, 18 and 19 from [fol. 98f-214] time to time, just lay at the platform and then go out again.

Q. During morning rush hours trains come in, most of them, on tracks 21 and 20——

A. No. During morning rush hours they come in on all of those four tracks, 18, 19, 20 and 21. In addition, on 5 and 6, 8, and then one train on 9 in the center of the station. That is, it is during the rush hours quite a good many trains come in on tracks 18 and 19 that are not tail-switched. They go right back again for another movement.

Q. This tail switching movement, will you just explain what that involves, normally, when a train comes in and tail switches the cars out? What I have in mind particularly, does that involve crossing some of the tracks and interference with train movement at the platforms pending that switching?

A. Well, if a train comes in on 21, there is what they call a scissors cross-over at the west end of tracks 20 and 21, and trains coming on either of those tracks can be tail switched on the extension of either track through the scissors cross-over, and then brought back through another cross-over, and ladder track into 18 and 19. That is all shown very plainly on the plan.

Q. But that process slows up the number of trains that can be run in on track 21 as compared with the process if [fol. 98f-215] there was a loop and the train could just move right on from this station and take the loop, without any switching, and go right on?

A. Yes, to some extent. Although I think that it does not take any more time just to tail switch than is required to unload the train at the platform.

Q. But it slows up the use of that particular platform?

A. No, I don't know that it does, because trains require a certain length of time at the platform to unload.

Q. During the rush hours under your present operation, how many trains can you get by track 21 or 20 an hour?

A. I think the minimum time that is allowed for a train on either platform track is four minutes. That is the minimum interval between trains.

Q. You have four minute intervals between trains on any one of those tracks?

A. I think there are two or three such intervals. I know in making calculations we have considered that as the minimum time for the train to come in, stop, unload its passengers, and then go to the yard.

Q. What do you consider your morning rush hour?

Mr. Gardner: I object to that as having been testified to completely. The Doctor goes and delivers a lecture in New England, does not look at the exhibit, and now he is trying to find out what has been testified to and what the exhibits [fol. 98f-216] show.

Exam. Sullivan: Do the exhibits show the rush hour?

Mr. Gardner: It has been testified to again and again.

Exam. Sullivan: I don't recollect that in this case. Objection overruled.

The Witness: What is the question?

(Question as above reported was repeated by the reporter.)

The Witness: The maximum hour, peak hour, is from 8:00 A. M. to 9:00 A. M.

By Mr. Bauer:

Q. That is the hour that causes most difficulty?

A. Yes.

Q. How many trains come in during that hour?

A. On the present schedule there are 36 trains coming in in that hour.

Q. Take that schedule and distribute approximately, if you can, how those trains come in on 21 and 20, of the tracks here specified?

A. I haven't got that information here, and I don't recall.

Q. Most of them would come in on tracks 21 and 22, 19, 18 and 17, wouldn't they?

A. Yes, and by just referring to this exhibit 11, I see that we have on track 5, nine; on track 6, three; track 8, three, and track 9, one, westbound trains. Those all come [fol. 98f-217] in in the morning hours. Just how many in the hour between 8:00 and 9:00, I don't recall. But I should say probably about 10 of the 16 trains come in on tracks, 5, 6, 8 and 9.

Q. During that rush hour?

A. During that rush hour, because that is why we use those platforms, to relieve the situation.

Q. Those are incoming trains?

A. Incoming trains.

Q. During the rush hours?

A. During the rush hours.

Q. And the rest come in on the other tracks?

A. The rest come in to the best of my knowledge on 17, 18, 19, 20 and 21.

Mr. Bauer: That is all.

(Witness excused.)

Mr. Hotchner: I will call Dr. Bauer as a witness.

JOHN BAUER was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination.

Mr. Hotchner: I offer for the shortening of the record the suggestion that with regard to Dr. Bauer's statement of qualifications and experience and education, it can be copied directly from the other record, if it will shorten up things. If not, I will have to ask him to repeat it.

Exam. Sullivan: Possibly counsel will stipulate or agree [fol. 98f-218] as to what Dr. Bauer's qualifications are.

Mr. Gardner: I agree that the qualifications as testified to by him in the Whitestone Abandonment case and spread upon that record, be spread upon this record as what he would testify to here if asked now.

Exam. Sullivan: That will be understood, then. I think we can proceed on that basis.

Mr. Victory: The City will concede Dr. Bauer's qualifications.

The Witness: I am a graduate of Yale College; also have a degree of Ph. D. from Yale University in Economics and Finance. I received that in the spring of 1908.

Following 1908 I was instructor and subsequently assistant professor of economics at Cornell University. There I lectured specially on accounting, corporation finance, and on public utility regulations and valuation.

In the spring of 1914—I am just giving a brief chronological survey to save time—I took leave of absence from Cornell University and came to New York City as statistician for the Public Service Commission of the state of New York, First District. While with the Commission I had experience in cost analysis, accounting supervision, including various utilities in the City of New York under the jurisdiction of this Commission; in fact, I came down particularly to take charge of the revision of the uniform sys- [fol. 98f-219] tem of accounts issued by that Commission.

In 1918 I went to Princeton University to take charge of the newly created Department of Accounting, including accounting, corporation finance, and public utilities. I gave lectures in the graduate school on public utility valuation and finance and rate making.

In 1917 after the United States entered the war, I came back to the Public Service Commission of the First District of New York to take charge during the period of the war of the special investigations, all of an accounting and financial character, that came up because of war emergency conditions.

During that time, I had occasion to analyze the financial situation, costs and earnings of most of the public utilities that were under the jurisdiction of the Commission and which sought relief because of war time conditions.

In 1919 I resigned my position from Princeton University—I was on leave of absence—also my position with the Commission, and went into private consulting in public utility matters, valuation, rate making, finance. In the meanwhile I have been retained in many of the rate cases in which the City of New York was involved. I have participated in many cases, in making cost and financial analyses in practically all of the transportation cases; also a number of gas and other cases, and I have appeared in various cases for other Commissions and courts, in other [fol. 98f-220] states, New Jersey, Massachusetts, Indiana, Missouri and Georgia, as an expert witness, on financial analyses, and particularly cost analyses.

Here in the City of New York, when retained by the City of New York, I was connected particularly with the Rental cases before the Transit Commission involving the rentals paid by the Long Island Railroad Company for the use of the Pennsylvania station.

By Mr. Hotchner:

Q. The predecessor case to case 7308 of the Interstate Commerce Commission?

A. That is correct. I appeared before the Commission in that case as an expert for the City of New York. Likewise I appeared for the City of New York in the Commutation cases involving the proposed higher commutation rates to be charged by the Long Island Railroad Company before the Transit Commission and Public Service Commission combined. Apart from the experience in rate analyses and valuation and cost analyses I have written——

Q. Before we get away from that, and before we depart permanently into the case, I have a memorandum that you

were connected with the Commutation fare case of the New Haven Railroad in a similar capacity?

A. Yes sir.

Q. And also in the Seven Cent Fare subway case recently decided by the Supreme Court of the United States?

A. That is correct. I had two affidavits that I prepared [fol. 98f-221] on the earnings and cost expense of the Interborough Rapid Transit Company, both of those affidavits going to the Supreme Court among other documents.

Q. And also on some of the other railroad cases, rate cases within the City of New York?

A. Yes sir. During just the past few months I appeared before the Transit Commission as a witness for the City of New York in the 8th and 9th avenue cases and the Steinway case, both involving proposed increase in rates to seven cents.

Q. And among other cases in which you are now engaged is the state-wide investigation being conducted by the Public Service Commission in the effort to establish uniform forms of rates for gas and electricity throughout the state of New York?

A. That is correct.

Q. And also the Brooklyn Union Gas Company case?

A. Yes, that is now being conducted before the Public Service Commission.

Q. And the Brooklyn Borough Gas Company case finished a number of months ago?

A. I appeared as an expert witness before the Public Service Commission in that case.

Q. What did you say with regard to writings and books and scientific organizations before which you have lectured and prepared papers?

A. I am the author of "Effective Regulation of Public [fol. 98f-222] Utilities" published in 1925 by the McMillan Company.

I have published a large number of articles, special reports, et cetera, in the leading economic journals and financial papers and technical journals; I am editor of the Public Utilities Department in the National Municipal Review, which I conduct regularly each month.

I have participated frequently in the discussions of public utility regulation, valuation, railroad rates, and

public utility rates before the American Economic Association meetings; spoken before a large number of public organizations on the questions of regulation, involving the cost of service and rates.

I went the other day to speak on the subject of regulation and bases of regulation at the Citizenship Forum conducted by the University of New Hampshire.

Q. And that brings to my mind that you have continued to lecture before Universities here and there and give special lectures?

A. I have given special lecture courses in the graduate school of Columbia University on public utility regulation and finance. Those lectures I subsequently elaborated and they appeared in my book, "Effective Regulation of Public Utilities."

During the past year I lectured at Oberlin College and Vassar.

[fol. 98f-223] By Mr. Hotchner:

Q. Are you acquainted with the issues of facts in this case?

A. I am.

Q. What are the principal issues in this case?

Mr. Gardner: I object to that as irrelevant.

Mr. Hotchner: I am not asking him to include in that any legal issues, but issues of fact.

Mr. Gardner: I object to his stating the issues of fact or law either.

Exam. Sullivan: I think the issues are set forth in the record fully. I think that would be repetition. He can only state what is already there.

Q. Did you make a thorough investigation of the facts in this case when they were up for determination before the State Transit Commission roughly about five years ago?

Mr. Gardner: I object. This case was not up before the Transit Commission five years ago.

Q. When there was up before the Transit Commission about five years ago the question of the approval by the Transit Commission of a contract between the Long Island

Railroad Company, the Pennsylvania Railroad and the Pennsylvania Tunnel & Terminal Railroad Company, covering the joint use of trackage and other facilities in the three zones from 10th avenue, New York to and including Sunnyside Yards, Long Island City; did you make such a study?

[fol. 98f-224] A. I did.

Q. And did you testify in that case before the Transit Commission in the City of New York?

A. I did.

Q. And also in the succeeding case?

A. I did.

Q. Both cases being known by Transit Commission Nos. 2692 and 2754?

A. Yes. I made a comprehensive detailed investigation of all of the facts and questions that were there involved. I made particularly a cost study, and an analysis of costs. Those included especially the wheelage basis of allocation between the companies.

I also made a study and was aided in that study by Mr. J. C. Brackenridge, an engineer, of the physical layout of the station and all of the structures; this included the requirements of the Long Island Railroad as compared with the Pennsylvania Railroad. I testified on that whole situation, and Mr. Brackenridge, part of whose studies I used in mine, and who co-operated closely with me, testified also before the Transit Commission in those cases.

Q. In your opinion is the wheelage basis a proper or correct basis of allocating terminal costs between the Pennsylvania Railroad and the Long Island Railroad?

A. When I use "proper" I do not mean it in any ethical [fol. 98f-225] sense. I mean——

Q. Like the word "correct?"

A. I mean proper with relation to the cause of costs; relation of costs; the underlying, economic relations of costs. I shall use "proper" throughout in that sense, without any ethical connotation at all. It is cost relationship.

With that explanation I will say that the wheelage basis is not a proper basis of allocating costs between the two companies using the Pennsylvania terminal.

Q. Do you purposely limit your answer to two companies? Are there any more than two?

A. In this case the allocation is between the two companies; the wheelage units of any other company that may use the station are included in the Pennsylvania Railroad, so that the problem really is between the two companies, and I am limiting my answer to those companies. If the two companies were operating jointly in a terminal, and if they had the same kind of requirements, and the same kind of operation throughout, then, of course, the wheelage basis would be a correct basis. If there is a similarity of conditions and operation and requirements as to use in serving the public, then, of course, the wheelage basis would be a satisfactory and proper basis. If, however, there is a wide dissimilarity both as to requirements by the two companies and as to conditions of operation, then the wheelage basis is not proper.

[fol. 98f-226] Q. Then what is your answer to my question as to whether in your opinion the wheelage basis is a proper basis for allocating the costs in this situation?

A. It is not a proper basis.

Q. Will you please state your reasons for that opinion?

A. The reasons are mostly twofold. A number of reasons can appear, but I think the two principal reasons are the controlling ones.

The first is the relative requirement for the service rendered by the two companies. The second relates to the density of utilization of operation by the two companies.

In regard to the first point, the Long Island Railroad furnishes very largely a Rapid Transit service. The Pennsylvania Railroad renders a Trunk Line passenger service. When I say the Long Island furnishes a Rapid Transit service, I realize that it is not wholly like the service of the Interborough Rapid Transit Company, but it is more nearly like the service of the Interborough Rapid Transit Company, Rapid Transit, than it is of the trunk line service. It is the multiple unit operation. It serves densely settled sections in suburban areas. Its mode of operation is Rapid Transit, and its requirements are Rapid Transit. No elaborate terminal facilities are needed. All that the people require and need is convenient access to the tracks and expeditious leaving of the trains to get to the streets.

[fol. 98f-227] The kind of facilities is indicated best by the terminals either of the Interborough, or more particu-

larly the Hudson Terminal of the Hudson-Manhattan Company, where there is no elaborateness; where all facilities are simply furnished for quick movement of people.

So far as the Pennsylvania is concerned, the situation is altogether different. It is a trunk line. The terminal is a terminal for a trunk line system. It does require a more elaborate layout. It requires more service for its public. It must have elaborate waiting rooms, information service, and baggage service, et cetera. And that is what the Pennsylvania Terminal is, therefore, preponderantly. It is not, therefore, the kind of service required by the Long Island.

In regard to the second point, which is density of use, the Pennsylvania, again as a trunk line service, operating trunk line traffic, has no very dense utilization. The Long Island on the other hand has a very dense utilization. It pushes through its trains as rapidly as possible, especially during rush hours, in and out. Its density approximates the rapid transit, rather than the trunk line service of a trans-Continental railroad.

The unit costs of service depend on two factors, the requirements of facilities for the traffic, and the density of utilization of those facilities.

For the Long Island Railroad there is needed, and there [fol. 98f-228] is given, only limited, comparatively, facilities. Those are used with great intensity, with great density. Hence the unit costs are small.

In the case of the Pennsylvania Railroad there is a much more elaborate provision for the kind of traffic, and the density is very much lower. Hence, there is a much greater unit cost. Both factors in the Pennsylvania work towards high unit costs. Both factors in the case of the Long Island work for low unit costs.

The wheelage basis, car unit basis, obliterates the effect of both of those factors. While the mode of operation and density in the case of the Long Island works for low unit costs, the Long Island on the wheelage basis does not get the benefit, while the elaborate requirements and low density of the Pennsylvania works for high unit costs, and the Pennsylvania on the wheelage basis would not be charged such high unit costs. It would get the benefit of high density due to Long Island operation, whereas the Long Island would be loaded up on the wheelage basis with

the high unit costs due to the conditions in the Pennsylvania operation.

Those are the reasons why I think the wheelage basis is improper from the standpoint of cause of cost relationships in this terminal as provided for and used jointly by the two companies.

Dir. Bartel: May I interrupt you for a moment. You [fol. 98f-229] testified before the Transit Commission in the prior cases. What principle governs the Transit Commission in determining the separation of costs in a case of this kind? Is there some requirement of the statute?

The Witness: The Transit Commission?

Dir. Bartel: Yes.

The Witness: No. The Transit Commission, as I understand it, was free to fix an amount of rental on the basis as it found to be just. Of course, there are some legal questions involved.

Dir. Bartel: What I am getting at is this: Under the Interstate Commerce act the Commission in fixing compensation—"as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceeding."

I am wondering if there is some similar principle governing the Transit Commission?

The Witness: I think I get the general significance of that provision. I don't believe there is any corresponding provision in the state law. There was there, as I understand it, the question before the Transit Commission whether it had any more power than to just approve or reject a particular agreement. There is a legal question there. But as I understand it, the Transit Commission did proceed in general that it was its duty to fix a reasonable [fol. 98f-230] rate. These points, as I have laid them out, were thoroughly gone into. All the facts were analyzed in great detail before the Transit Commission in the record. Out of the whole situation there emerged this result, that the wheelage basis was applied to the general run of operating costs and to the general run of fixed charges, on the tracks, et cetera. But there was eliminated the entire investment in the station, and a large proportion of operating expenses in the station. The City contended, and I believe

I expressed myself on the record, that even to that extent the wheelage basis placed an excessive burden upon the Long Island. But there was that compensating feature, in that that whole investment in what we presented as an elaborate structure for the benefit of Trunk Line traffic, without any service to the Long Island, was eliminated. All fixed charges relating thereto were eliminated, and the cost of operation that was plainly due to that character of service, was taken out of the joint account.

All of the rest of the costs were included in the wheelage basis. Of course, that kind of provision, with those eliminations, mitigated to a large extent the impropriety of the wheelage basis as a mode of allocation between the two companies whose requirements and degree of use was so different as in these two instances.

Take along the same line, take the New York Central Terminal that is used jointly between the New Haven Rail- [fol. 98f-231] road and the New York Central Railroad Company. There too the wheelage basis is used throughout. I had occasion in connection with another case, to go thoroughly into that analysis. There you have, however, two railroads whose conditions of use and relative requirements were practically identical.

Mr. Gardner: That is not in this case. He is stating his own facts from which he is drawing his own conclusion, and we will get very far afield if he is permitted to do that.

The Witness: This is in reply to the question, and I will say of my own knowledge, that in that station the conditions between the——

Mr. Gardner: That is not in answer to the question at all.

The Witness: I will let the Commissioner decide that.

Mr. Gardner: You will have to. Whether the Transit Commission had any rule with respect to the application of the wheelage basis which would bear upon the statute which was read—now he is starting to tell from his own knowledge what the conditions are. He can keep that up for a week.

Dir. Bartel: Have you had any experience in condemnation proceedings?

The Witness: Yes sir.

Dir. Bartel: Have you had any experience in condemnation proceedings in connection with the question of this sort?

[fol. 98f-232] The Witness: Not with a terminal, no sir, I have not.

Dir. Bartel: I don't know as this question has ever been up before the Commission. That is the reason I would like to get some light. I don't know whether the question has ever been before the Commission, and I wondered if you could give us any light on it.

Mr. Victory: Under the Constitution there must be just compensation, which is somewhat different from the fixing of a value in a rate case.

Dir. Bartel: I am just using the terms of the Statute under which the Commission is supposed to fix just compensation.

Mr. Victory: Of course, common law principles would govern. You would have confiscation if you did not have just compensation. But the Doctor does not state, and the plan which he outlines does not come in conflict in any way with the theory of just compensation.

Dir. Bartel: I am not saying that anything he says is in conflict with anything. I am just trying to get some light on the meaning of the statute.

Mr. Victory: He is trying to outline a theory or method of fixation of the return here which would be just compensation. He claims that the present method would not be just compensation to the Long Island.

Dir. Bartel: What I am trying to find out is whether what the Doctor is contending for here would be such com-[fol. 98f-233] pensation as would be proper in a condemnation proceeding.

The Witness: In reply to that I think that my presentation of this matter would comply and apply to the condemnation proceedings, when they are properly applied to the conditions that here prevail under the circumstances. Of course the conditions are not like an ordinary condemnation. Apply condemnation here, and apply it to the conditions here prevailing; I think the wheelage basis would be wholly improper as a basis in a condemnation proceeding. and I think a different method along the line that I shall propose or expect to propose, I think would meet the requirements of condemnation as properly applied.

Dir. Bartel: Off the record.

(Informal discussion off the record which was not recorded.)

By Mr. Hotchner:

Q. You said in the previous Rental case before the Transit Commission there was eliminated from the wheelage basis the investment in the station terminal, substantially $15,000,000, and also a part of the operating costs at the terminal?

A. Yes sir.

Q. Wasn't there also a question concerning the matter of interest?

A. Well, of course, the significance of eliminating the investment comes in in the interest. That is the interest on [fol. 98f-234] the station investment, the fixed charges on station investment were eliminated from the costs that were apportioned on a wheelage basis, and the cost of operating those special facilities.

Q. You understand, do you not, that in the previous cases the interest on investment was fixed somewhere about four per cent, and the railroad now proposes not only to put back the investment feature of about $15,000,000, but also to ask for an allocation on the basis of six per cent interest?

A. Yes. I know that there is an increase proposed in the rate of interest as compared with the present rate.

Mr. Gardner: You are not criticizing that?

The Witness: I have not directed my analysis to that at all up to the present. I think there is a question here as to the propriety of the increase under the conditions prevailing in New York in this terminal. There is a question as to whether it is justified on the basis of the history of construction, present condition, et cetera. But my principal study has been directed towards the propriety of the wheelage basis as the method of cost allocation with relation to the cause of the costs and the relation of costs to the two companies.

Q. And you stated before that certain analyses were made and presented, and that the City of New York in those previous cases took a certain position. It is a fact, is it not, [fol. 98f-235] that the Association of Long Island Commuters was in these cases as a party and contested along with the City of New York and took substantially the same positions?

A. Yes. The Long Island Commuters Association worked harmoniously and directly with the City of New York, utilizing expert and special studies that were made.

Q. You started to testify before that you had made a personal physical examination and study of the conditions prevailing at the Grand Central Terminal in New York City where there is joint use of facilities between the New York Central and the New York, New Haven & Hartford, and I believe that some other question came in there, and that you did not conclude the comparison between those facilities and the use of them, and the facilities at the Pennsylvania station and the use of them. Will you please conclude your answer and give whatever else you wish on that?

A. I was virtually finished on that. What I wanted to say was that under the circumstances of joint use in the Grand Central Terminal I think the wheelage basis as between the New York, New Haven & Hartford and the New York Central is the proper basis. There I could find, and so testified, no better basis of allocation.

It is entirely proper. There, however, the conditions of relative requirements by the two railroads were essentially alike, and the relative density of use of the facilities was [fol. 98f-236] very nearly alike. So that no better basis could possibly be found as between the two companies under those like circumstances than the wheelage basis.

Here, however, in the Pennsylvania station, conditions are totally dissimilar with respect of the two fundamental factors affecting costs, namely, requirements of physical facilities, and, secondly, as to density of utilization.

As I said in regard to both of those requirements, the Long Island operation results in low unit costs, and in respect of both factors, the Pennsylvania operation results in high unit costs.

The wheelage basis deprives the Long Island of the benefit of the low unit costs and transfers that benefit to the Pennsylvania.

Q. Do you plan in your testimony to take those two principal factors or issues that you have just referred to, and connect them up with various exhibits that have been put in by the company, and your analysis of those exhibits?

A. I have intended to produce that.

Q. Will you please take Exhibit 14. Does that present the cost allocation on the basis of the proposed wheelage basis for the year 1928?

A. It does.

Q. And are you prepared to make an analysis of this exhibit with reference to the wheelage basis use in cost allocation?

[fol. 98f-237] A. Yes.

Q. Will you please first take interest; take the question or item of interest and tell us about that. You now have before you exhibit 14?

A. Yes sir.

Q. All right.

A. The costs that are allocated between the two companies include 10th avenue to 6th avenue, which has been called zone 1; 6th avenue over to Harold avenue, zone 2——

Q. This Harold avenue is Harold avenue, Long Island City?

A. Yes, and Sunnyside yard as zone 3.

I will take particularly from my analysis zone 1, because it brings up especially the impropriety of the wheelage basis. In that zone the investment as stated in exhibit 14 is $46,986,747. The interest at six per cent on that amount is $2,819,205. That, then, is allocated between the two companies on the wheelage basis. This results in allocating to the Long Island 41.44 per cent of its entire cost. But the amount of the investment and, therefore, the interest requirement, is dependent entirely on, or almost entirely upon the physical layout of the tracks, structures and especially the station building. Almost altogether, or preponderantly, on the track level, the layout is presented in the interest, and was presented originally in the interest of and according to the requirements of the trunk line [fol. 98f-238] Pennsylvania system.

Exhibit No. 11, which presents the individual tracks, shows clearly that a small number, that five tracks, were Long Island tracks, and the rest of the 21 were Pennsylvania tracks for the elaborate trunk line Pennsylvania requirements. This differentiation is carried out clear into the entire station structure. It includes that use for station structures. It includes the building itself.

The interest on this entire amount was fixed, once for all, or determined once for all, when the layout was put down, and the structures were put in, the building put up.

The scope of the investment was determined by the requirements of the Pennsylvania. This applies to the

tracks, it applies to the land, and it applies especially to the building itself.

Q. And its type?

A. And its type, elaborateness and architecture. Particularly to that. The wheelage basis would result in transferring a large proportion of these charges upon the Long Island. The number of wheelage units, or the percentage of wheelage units of the Long Island has been steadily increasing. This means that the facilities that it has been using have been utilized with ever increasing intensity.

Now the Long Island does not utilize—its passenger trains do not utilize—do not need—elaborate station facili- [fol. 98f-239] ties. But, increasingly, as shown by exhibit No. 8, all of these costs under the wheelage basis would be allocated against the Long Island.

In 1920, the percentage, Long Island percentage, was 28.55 per cent of the total wheelage units. This has gradually moved up year by year. There has not been a single year when there has not been an increase in this percentage. During 1928 it was 41.44. Hence, increasingly, although the amount of the interest was fixed once and for all when these elaborate structures were put in for the benefit and requirements of the Pennsylvania trunk line system, the amounts have been increasingly transferred and burdened upon the Long Island because of this change in relationship of wheelage units.

The density of the Long Island has been moving up rapidly year by year. It has used the same facilities more intensively according to the requirements of the Long Island. But under the wheelage unit its interest cost would have been burdened increasingly upon the Long Island although due to the elaborateness of the layout as required in the interest of the Pennsylvania trunk line system, and it is for these considerations that before the Transit Commission, the station itself with its investment, was eliminated from the wheelage units.

Mr. Gardner: I think that the Commission's opinion should stand on that point rather than the witness'.
[fol. 98f-240] Exam. Sullivan: He is merely expressing his opinion.

The Witness: That finishes the question of interest.

By Mr. Hotchner:

Q. How about the question of taxes?

A. The question of taxes follows parallel with the discussion of interest. The taxes are due preponderantly to the physical properties that are there and their character. They depend practically not at all, or very slightly, upon this increasing density of use on the part of the Long Island. They are there because of the elaborateness of the structures and the great investment put into this great layout for the Pennsylvania.

Again, the wheelage basis results in transferring increasingly these costs upon the Long Island so that the Long Island Railroad does not benefit any more and does not need any more those facilities, especially so far as the elaborate layout of the station and those special structures are concerned.

Q. Will you please next take the question of operating costs or expenses?

A. To a large extent, but not quite so large an extent, the criticisms or analysis that I made apply also to operating expenses. Before the Transit Commission we had operating expenses spread out in detail by accounts as prescribed by the Interstate Commerce Commission; an analysis of that spread, spread out, showed that a very large proportion of operating expenses were connected [fol. 98f-241] directly with the elaborate requirements of the station itself, the station employes used in connection with all kinds of special station services for the Pennsylvania, and practically not at all for the Long Island, were included in this total, and for this reason a large amount of station expenses were eliminated from the wheelage basis of allocation.

There are some expenses, but not so very many, that do depend more or less directly upon the wheelage unit, but very few of them.

Q. It comes to my mind now, do you know whether the company has presented here any detailed statement or separation of the operating expenses at the station?

A. No, not so far as I have been able to find them among the exhibits. But I was not here when the exhibits were presented. I have found no such detailed statement, neither a detailed statement by individual accounts for the

investment that we had in at the time before the Transit Commission. We had the details spread out as to the investment, for what purposes and functions the investments were made, which gave some ready opportunity for detailed analysis as to the relationship of the costs.

I think a detailed statement of operating expenses would identify very clearly the large station costs which obviously are due to Pennsylvania requirements and not for any actual service needed by the Long Island. That, of course, [fol. 98f-242] does not appear directly in a statement where all of the operating expenses are grouped into a single amount.

Mr. Hotchner: I would like to ask whether the company has available the details or separation of details of operating expenses of the station?

Mr. Gardner: No, we have not.

Mr. Hotchner: And also the details of the investment, the different items such as land, structures and tracks?

Mr. Victory: I put those in to some extent.

Exam. Sullivan: Can that be furnished?

Mr. Gardner: I don't know how long it would take.

Mr. Victory: I think I can put them in evidence.

Mr. Gardner: You mean the old record?

Mr. Victory: Yes.

Exam. Sullivan: We want the data up to date for the purposes of this record.

Mr. Hotchner: Could we get that statement of operating expenses at the station and also the investment in the station, both statements broken down into the component parts and details under the same headings as presented to the Transit Commission, and brought down to date?

Mr. Gardner: No, we haven't got that.

Mr. Hotchner: The company presented it at that time.

Mr. Gardner: You have had weeks in which they might have asked for anything that was in the other case, if they [fol. 98f-243] wanted it.

Mr. Hotchner: I think the Commission is interested in getting at the facts, irrespective of when anybody asks for it.

Exam. Sullivan: If they cannot, I presume that is all there is to it. You will have to let the record stand as it is and speak for itself on that point.

Mr. Hotchner: We don't know as a matter, that irrespective of its immediate instantaneous availability, I think there is no question but what the facts are in the possession of the company, as to the details of its operating expenses at the station, and as to the details of its investment in station facilities. I think there can be no question that they have the information, and while they may not have it instantly available so they can put their fingers on it in one of the bags that are here today, I think it is there, and the questions in relation to them are important enough to justify their presenting the information, and I think the Commission would want that information.

Dir. Bartel: Such a statement was put in before the Transit Commission?

Mr. Gardner: Yes.

Dir. Bartel: Would it be much of a job to bring that up to date so that you could present it within 10 days?

Mr. Gardner: That I don't know.

Mr. Rawson: That I think would have to be all made [fol. 98f-244] up. In other words, they did not keep a combined statement for the year. The accounts are made up monthly, and it would be quite a laborious job to dig them out. I don't know just how long it would take.

Mr. Hotchner: I think that we would be content if the statement was presented for one year, 1928. That would illustrate the whole business and all the principles that we are contending for.

Mr. Gardner: I think we are entitled to some consideration on this demand. Without doing a thing to prepare this case, they have waited, after a substantial adjournment because they wanted time, because they were not familiar with the practice or had other engagements, or both, and now they come in and ask us to make up entirely new schedules, which they very well must have known they would require to develop this theory weeks and weeks ago. I don't think it is fair.

Mr. Hotchner: There is a large public interest in this case.

Exam. Sullivan: In a case of this kind the interveners are always more or less at a disadvantage because all of this information is in the possession of the carrier.

Mr. Gardner: Why didn't they ask for it six weeks ago?

Exam. Sullivan: They may not have thought of it sooner. The fact remains that they did not, and it seems to me the applicant should be willing to furnish the detail of its [fol. 98f-245] summaries that it submits here. If the applicant insists that it does not want to do it, and that it won't do it, and desires to submit the case on that basis, all right.

Mr. Gardner: I am certainly not going to say that we desire not to do it; if you say we ought to, we will have it. How long it will take I cannot tell.

Exam. Sullivan: I think it ought to be in this record. The totals are there and the summaries are there, and if the parties want details, it seems as though they should be put in.

Mr. Gardner: Why didn't they ask for it two months ago?

Exam. Sullivan: That is neither here nor there. They are asking for it now and they are within their rights, and I think they are within their rights, although it would have been better to ask for — sooner, to give the applicant plenty of time.

Mr. Hotchner: It has been constantly thrown at us about delays, and that we have not asked for stuff. These very powerful companies put in their application to the Interstate Commerce Commission some time in January, and a date was set, and they flub-dubbed, and they were not ready, and we did not complain of the delay.

Mr. Gardner: We are unable to determine how long it would take to get these details. The investment will not take long to get.

[fol. 98f-246] Mr. Rawson: Do you wish the operating expenses for all sections divided by accounts, or just for the station section?

Exam. Sullivan: How long will it take you to work that out?

Mr. Rawson: I don't know. There is a mass of detail in the office of the supervisor of the division of expenditures, and I don't know in just what shape it is. I cannot say until I make inquiries.

Exam. Sullivan: Can it be done within 10 days or two weeks?

Mr. Rawson: I think so. Is it necessary to have it for all three sections, or will the station section suffice?

Exam. Sullivan: Do you want the information for all three zones?

The Witness: I think for the purpose of bringing out just clearly the issues that are involved here, I think the details for the station section would be sufficient.

Exam. Sullivan: That is the first zone?

The Witness: That is the first zone; if the operating expenses for zone 1 were presented in detail as we had them in the Transit Commission case; the same for taxes and the investment, I think that would be adequate.

Mr. Gardner: Why cannot he take his exhibit in the old case and develop his theory and all of his arguments from that exhibit, instead of holding this case open for some [fol. 98f-247] weeks to get data which they should have asked for months ago?

Exam. Sullivan: Is there any substantial difference between that exhibit in the old case and what the conditions would be for 1928?

Mr. Gardner: I understood the Doctor to say that his theories and arguments were based on that old exhibit, and I will ask Mr. Rawson now, whether you think that the Doctor could use the old exhibit?

Mr. Rawson: I think for the purposes of illustrating, I think the relation between the charges to the different accounts is very little different now than it was then. The totals have been increased, but the relation between the charges to the different accounts, is very nearly the same now as it was then, and I think that would be satisfactory to develop the theory.

By Mr. Hotchner:

Q. Has the intervention of the wheelage basis made any difference?

A. The wheelage basis was in there and it is in here, and I think except that it has a difference of five years, I think the old exhibit would be satisfactory.

Mr. Gardner: Have you got the old exhibit?

The Witness: I have not.

Exam. Sullivan: Off the record.

(Informal discussion off the record which was not recorded.)

[fol. 98f-248] Exam. Sullivan: We will take a short recess.

(Short recess.)

Exam. Sullivan: Proceed.

By Mr. Hotchner:

Q. Have you now, Doctor, in form a statement that will assist you in developing the question of the separation or allocation of expenses, operating expenses, at the Pennsylvania terminal?

A. Yes. I have here before me exhibit No. 25 in the Transit Commission case, with details; that details the operating expenses for the various zones, including zone 1, station zone. That shows the operating expenses for the year 1923. Reference to that exhibit shows that a very large proportion of the operating expenses of the zone are directly connected with the station. The total expenses of the entire station zone for 1923 were stated at $2,140,629.90. Of that amount $1,247,221.38 were for station employes alone, employed in the station in zone 1. The relative proportion indicates the elaborateness of the station and the services.

Further analysis shows that among the maintenance of station and office building, $158,584.45 out of a total maintenance of way and structures of $368,820.09——

Exam. Sullivan: Do you propose to offer this document as an exhibit or are you going to just use it for what detail you want to put into the record?

The Witness: I think it would serve very well as illustra-[fol. 98f-249] tive so that it can be used for the purpose of further elaborating the issue as we draw it.

Exam. Sullivan: Is that document available for the record? That is, have you given it to them to present here if they desire?

Mr. Hotchner: Will we be bound by any other figure than those to which Dr. Bauer refers?

Exam. Sullivan: My understanding is that the purpose of this is simply to demonstrate the theory of the apportioning of expenses.

Mr. Hotchner: With that understanding we offer it.

Exam. Sullivan: It will be accepted as exhibit No. 29, consisting of four sheets.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 29, Witness Bauer," and is forwarded herewith.)

The Witness: Also from the Transit Commission case I have here exhibit No. 26. That gives for July, 1924 the number of station employes, the classification of station employes, the number in each class, and the distribution between Pennsylvania Railroad and Long Island; that is, whether they are employed exclusively for the Pennsylvania or how many for the Long Island, and how many are joint. That shows the preponderance of station use for Pennsylvania. I think that ought to be taken in connection with the previous exhibit.

[fol. 98f-250] Q. Will you summarize it in a few words?

Exam. Sullivan: It won't be necessary to summarize it if it is set forth in the exhibit.

Mr. Hotchner: We will offer it as another exhibit.

Exam. Sullivan: It will be received as interveners' exhibit No. 30.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 30, Witness Bauer," and is forwarded herewith.)

The Witness: With respect to investment, exhibit No. 34 in the Transit Commission case shows the investment in different zones for the various purposes. It gives the amount for station building and the real estate in that zone. I think that shows the extent of the preponderance of use of the requirements of the building, Pennsylvania as compared with the Long Island, and I think that ought to go in for like informative purpose.

Mr. Hotchner: I offer that on behalf of the City and the Commuters Association. All of these exhibits are offered for the Association and the City.

Exam. Sullivan: It will be received as interveners' exhibit 31.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 31, Witness Bauer," and is forwarded herewith.)

[fol. 98f-251] Q. Are you ready to proceed now, Doctor?

A. Yes sir.

Q. Take generally the question of the testimony you have been giving with regard to interest, taxes and operating expenses. In your opinion have any of these costs any direct dependence upon the number of wheelage units operated through the various departments or sections of the terminal properties?

A. There is no cost that is directly and immediately dependent upon the number of wheelage units. There are some costs that might very well be allocated on a wheelage basis. Take, for example, power. I think power is probably more readily, more satisfactorily allocated on a wheelage basis, than any other. But even there the greater utilization on the part of the Long Island works towards reduction of unit costs. That applies to maintenance, interest and taxes on distribution system and plant. But I think that that is such a small element that I think for that the wheelage basis would be proper. There is hardly any other cost that enters into this joint station account that is dependent upon and varies with the number of wheelage units.

Q. Is the wheelage basis now in the agreement governing the use and payment for the joint facilities of the station?

A. It is. But as I said earlier in another connection, that the station costs are excluded which, of course, limits materially the impropriety of the total result of the wheelage [fol. 98f-252] basis applied to the station.

Dir. Bartel: You were not here yesterday, but I brought that out through Mr. Rawson.

Q. In your opinion does the present rental represent a correct cost allocation?

A. I think it does not.

Q. What in your opinion is the proper basis of determining the rental that should be paid by the Long Island Railroad for its use of the joint facilities at the station and the three zones?

A. I think the proper basis of determining the rental paid by the Long Island would be the cost that would be incurred in furnishing facilities and operating the facilities designed in harmony with the requirements and needs of the Long Island service. The entire layout of the present

terminal is determined by the requirements of the Pennsylvania system and the Long Island is simply accommodated within that. The basis of determining rentals should be based upon the cost of furnishing the requirements, if they were designed specifically for the needs and purposes of the Long Island considered separately.

Q. And in your opinion the station was not at all designed to cover and satisfy the needs or requirements of the long Island Railroad?

A. That is correct, and as a result the costs are on a [fol. 98f-253] much higher level than they would be if the facilities had been designed for the Long Island, and the wheelage basis results in putting these costs upon the Long Island.

Q. Earlier this morning I heard you say something about the terminal in New York City downtown of the Hudson-Manhattan Railroad Company as being closer to what would be required for the Long Island Railroad. Did you finish your statements then on that point, and were they on the basis of some similarity in needs between the two companies, the Hudson & Manhattan and the Long Island?

A. I think the character of transportation is virtually the same as between the Long Island and the Hudson & Manhattan. There are, of course, differences, but the Long Island is more nearly like the Hudson & Manhattan service than any other in the city. The kind of terminals that would serve best the Long Island, considered just in the interest of its own commuters and passengers would be more like the terminals used by the Hudson & Manhattan that were, on the one hand, like the Hudson Terminal which serves a very much larger number of passengers annually than the Pennsylvania for the Long Island, or the terminal of the Hudson-Manhattan at 33rd street, or the Newark terminal. Any one of those three would be much more satisfactory, and in the Transit Commission case we had the facts analyzed with reference to the Hudson-Manhattan and the cost of operation on that basis.

[fol. 98f-254] Q. I show you several papers, Dr. Bauer, marked exhibits 58 and 59 in the previous Rental cases before the Transit Commission and ask you to take a moment to examine them to see whether they give any informa-

tion that is of interest on this subject that we are now discussing?

A. These two papers were exhibits 58 and 59 in the Transit Commission case. They are studies prepared by me, and they bring into this analysis the experience and costs of the Hudson-Manhattan. It is a study based on a comparison of the Long Island and Hudson-Manhattan operation.

Mr. Hotchner: I offer in evidence on behalf of the Association of Long Island Commuters, and the City of New York joins in, does it not?

Mr. Victory: Yes. In reference to that exhibit 58, you have determined there what the cost per car mile in cents is in the case of the Long Island and the Hudson-Manhattan; have you not?

The Witness: Yes. I have not gone very recently into the details of the study. I know that the facts are in there, but I have not clearly enough in mind just what I did have in there to testify offhand.

Exam. Sullivan: Do you know whether the Hudson-Manhattan Company owns the office building that is above its terminal downtown New York?

The Witness: Yes sir, it does.

[fol. 98f-255] Exam. Sullivan: Does your study include the rental returns from that building?

The Witness: No, it does not, for the reason that the building part was segregated from the transportation part. That whole matter was before the Interstate Commerce Commission, and the Commission made a finding in that, speaking from memory, subject to correction; it has been sometime since I went through those facts. But the Commission took out the entire building and it allocated, I think, half or two-thirds of the land to the building, and left the rest of the land as a part of the railroad structure.

Exam. Sullivan: Of course that was the separation of property held and used for transportation purposes, and property held otherwise?

The Witness: Exactly.

Exam. Sullivan: Nevertheless, there is other property not held for transportation purposes, that does constitute an additional source of income?

The Witness: That is correct, and I think I have not got that included in here. I have eliminated, if I remember correctly, those other items.

Since we have that Hudson Terminal here, in relation to the Long Island service, I believe, and we testified extensively before the Transit Commission on that—Mr. Brackenridge did also—that the kind of terminal facilities needed for the Long Island could very well have been sup-[fol. 98f-256] plied by a similar layout of buildings that did not need to be a non-productive monument that might be needed for trunk line service; so far as the Long Island was concerned, the building put on top of the land might just as well be fully self-supporting, leaving for the railroad part only the underground part, just exactly as the Interstate Commerce Commission made the determination in the Hudson-Manhattan case.

A similar treatment of the present case in the Pennsylvania and Long Island would take out a large proportion of the investment in zone 1 and would not burden any of it upon the Long Island.

Dir. Bartel: You have the reference to the decision of the Commission that you are referring to?

The Witness: I can get it for you.

Mr. Victory: It was a rate case.

The Witness: I cannot give you the citation because it came up incidentally.

Mr. Victory: They eliminated all the upper part of the building.

Exam. Sullivan: Do you know whether the Commission's Bureau of Valuation has completed the valuation of the Hudson-Manhattan Railroad Company?

The Witness: I don't know.

Mr. Victory: I think that there is a tentative valuation. [fol. 98f-257] Exam. Sullivan: Do you know whether that tentative valuation segregates carrier property from non-carrier property in substantially the same way?

Mr. Victory: I have never seen the tentative valuation.

Mr. Gardner: I object as irrelevant and incompetent.

Exam. Sullivan: Objection overruled.

Mr. Gardner: Exception.

Exam. Sullivan: The document consisting of two sheets will be accepted as interveners' exhibit 32.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 32, Witness Bauer," and is forwarded herewith.)

By Mr. Victory:

Q. In reference to this exhibit as interveners' exhibit 32, you have selected certain accounts from the roadway maintenance accounts of the Hudson & Manhattan and the Long Island, did you not?

A. Yes.

Q. And you consider these accounts and the apportionment of them in zones 1, 2 and 3?

A. Yes sir.

Q. And you finally determined the charge per car mile in cents, did you not?

A. Yes.

Q. Both as to roadway maintenance, station and office maintenance, and taxes?

[fol. 98f-258] A. I did.

Q. That is the relative charge per car mile in cents in each case?

A. Yes sir.

Q. And what did you find as to the charge per car mile as to the Long Island under these accounts?

A. It was 37.44 cents per car mile.

Q. And as to the Hudson & Manhattan?

A. For the same items, 15.83 cents per car mile.

Q. Showing that for both of these similar railroads so far as operation and characteristics are concerned, the charge per car mile in cents under these accounts to the Long Island is much higher than in the case of the Hudson & Manhattan?

A. Over twice.

Q. You made a summary of that account, did you not, or that statement?

A. Yes. I made a recomputation which appears——

Exam. Sullivan: That is shown clearly by the exhibit and it won't be necessary to develop that further.

By Mr. Hotchner:

Q. I believe that you have already testified that you presented your conception of the proper rental basis in your

testimony before the Transit Commission in the previous case?

A. Yes sir.

Q. Will you please tell us in what manner you presented [fol. 98f-259] your conception of the proper rental basis and allocation of terminal costs?

A. I based my analysis on the two exhibits that were just put in, exhibit 32. There were certain other factors that were included, but the difference between the Long Island basis and what I proposed, appears in exhibit 32.

Q. If the rental were determined according to your plan and idea, would the figure to be charged to the Long Island Railroad be less than what is charged under the present plan and under the proposed new plan?

A. It would have been less materially at the time in 1923 and 1924 when these cases were up and——

Q. Aren't you a bit too far? Weren't they up in 1924, 1925 and 1926?

A. When they were up. Since then the Long Island wheelage proportion has increased steadily. Hence the disparity would be greater now than it was at that time. In other words, I think that the present basis puts an excessive sum now upon the Long Island, if the amount were considered with relation to the requirements of the Long Island and the cost of furnishing those requirements.

Q. What have you to say as to the growth of the percentage of contribution by the Long Island Railroad as the density of Long Island traffic increases or mounts, irrespective of any increased use of facilities?

[fol. 98f-260] A. As the relative density of the Long Island increases, of course the amounts charged to the Long Island would be increased without regard to any increase in the total amount of costs. The total amount of costs, in other words, remained the same. There is an annual increase on the Long Island because of this growing density of the use of the limited facilities that it uses and requires.

Q. And that increased density which would bring with it an increased proportion to be paid by the Long Island does not involve any increase of facilities?

A. No. The wheelage basis as used is not predicated at all upon the increase in facilities needed and used by the Long Island. It is based wholly upon the number of car units.

Q. Will you please take exhibits 7, 8 and 11. Do they indicate the difference in the character of the service of the two railroads, meaning the Pennsylvania Railroad and the Long Island, and the difference in relative density in operation and use of the terminal?

A. Exhibits 7 and 8 show how both the number of passengers has increased much faster in connection with the Long Island than the Pennsylvania Railroad.

Exhibit 8 shows that the number of car units has increased very much faster, showing an increasing density of utilization on the part of the Long Island as compared with the Pennsylvania, and this increasing utilization, increas-
[fol. 98f-261] ing density, is a factor for producing the lower unit costs as the density increases. But the Long Island would be deprived of that benefit of lower unit costs through the wheelage basis.

Q. You asked, just before you took the stand this morning, you asked Mr. Rawson some questions with regard to the use of tracks and platforms and the intensiveness of their use.

A. Yes.

Q. Does that bring to your mind some material that you wish now to state?

A. I made a special analysis of exhibit No. 11, and I have a brief summary of that exhibit which I think will bring out clearly the difference in requirements and difference in degree or density of utilization. The exhibit shows that what are practically exclusive Long Island lines are tracks 17 to 21. It shows that a certain number of other tracks are used exclusively by the Pennsylvania. The rest are used jointly.

In the case of the Long Island exclusive tracks, there are 381 trains. The total Long Island trains east and west for the 24 hour period covering this exhibit is 481 trains. That shows that only 100 trains during the whole 24 hours occupied any of the other tracks, whereas 381 occupied five exclusive tracks. The five tracks, in other words, furnish the real measure and show really what are the facilities used for the Long Island; whereas the others are really Pennsylvania tracks.

[fol. 98f-262] Analyzing further the other tracks, there are six exclusive Pennsylvania tracks. These six tracks have a total of 88 trains in a 24-hour period or 14 2/3, in round figures 15, trains per track for the 24 hour period.

One track is used exclusively for Pennsylvania drilling. If that is included, then the average is only 12.7 trains per track.

Then there are other tracks that are used jointly with the Long Island. There are nine such tracks that are used jointly with the Long Island. They have 144 Pennsylvania trains or 16 trains per track. The point here is that the Pennsylvania has a slightly greater utilization as to number of trains per track on the so-called joint tracks than on the tracks that are used exclusively by the Pennsylvania.

The Long Island's use of those same tracks, jointly used tracks, is 11 trains per track of the joint tracks, whereas on its own exclusively used tracks, it is 76 trains per track.

Q. That is the Long Island?

A. That is the Long Island, on its own tracks that are exclusive tracks, there are 76 trains per track for 24 hours.

On the Pennsylvania exclusive tracks, there are only 15 trains per track for the 24 hours. On the jointly used tracks, the Pennsylvania has 16 trains per track or slightly in excess of its exclusively used tracks. The Long Island [fol. 98f-263] does have incidentally 11 trains on these joint tracks per track as compared with 76 trains per track on its own exclusively used.

These figures show by themselves that the real Long Island tracks and the facilities that it really uses for the most of its traffic are those exclusively used tracks. The rest is as incidental use of tracks which are really Pennsylvania tracks, there for the Pennsylvania service. If they were designed for the Long Island, and if they were laid out properly, and if the tracks were no greater utilized, but were so utilized as the exclusively used tracks, all that the company would need is one additional track instead of a joint charge of nine tracks. The bulk of the traffic, however, goes over the exclusively used tracks.

Q. And would that be a great saving to the Long Island?

A. It would be a great saving to the Long Island Railroad, and I think that the rental charge should be predicated upon those facts, that in reality the Long Island has five tracks. The most that it can properly be charged for is one additional track, so far as the track level is concerned. But the wheelage basis would put 41.44 per cent of those upon the Long Island, and as the percentage climbs

up with the growing density of utilization, the charge would increase.

Q. When you say 41.44 of that, you mean 41.44 per cent of the whole layout?

[fol. 98f-264] A. That is correct. Whereas what the Long Island really needs on the basis of its actual present operation, is six tracks, the five that it uses, and one additional one to furnish service that, in reality, is given and obtained by the passengers of the Long Island.

Q. How many tracks are there altogether?

A. 21 tracks.

Mr. Victory: Is it your contention then that it should pay on a proportion of 6/21?

The Witness: So far as the track level is concerned, that I think is the most that should be charged to it. But even that involves a layout that delays service and hampers service. If the layout were designed for this company so that the trains could move in and go right out, then a still smaller amount would be needed. But on the basis of the layout, six tracks out of 21 on the track level is all that should be apportioned to the Long Island.

Then when you come to the station level, of course the entire station and land, a due proportion of the land belonging to the station ought to be taken out, of the cost of operating that station; it serves not at all the Long Island business or the great bulk of it.

I have one other point in this connection. In relation to time in station, this shows an entire difference in characteristics of operation. This is based also on exhibit 11. [fol. 98f-265] The five Long Island tracks have 381 trains. Those trains occupy the tracks 91 hours 47 minutes or, in round figures, 14 minutes per train. This indicates that so far as the tracks that are really Long Island service, trains come in and go out pretty rapidly, 14 minutes per train.

For the rest of the Long Island trains, or the 100 trains that are spread over the nine jointly used tracks, the time is 34 hours and 35 minutes, or 21 minutes per train.

Referring to the exhibit it shows that of these trains there are engines, and a number of trains have parlor cars. That indicates that this is a little more elaborate kind of service and is not the normal preponderant part of the commutation business in the multiple unit system. Therefore,

on those jointly used tracks, because of the somewhat more elaborate service, the time of trains on the tracks is 21 minutes per train compared with 14 minutes on the Long Island exclusive tracks.

Then when we take the Pennsylvania trains, there are 233 on its own exclusive tracks, and on the joint tracks, with a total of 236 hours and 13 minutes, or averaging 61 minutes per train. This shows that the Pennsylvania trains have elaborate requirements. They are on the average one hour in the terminal for loading and unloading; furnishing a more elaborate service for through passengers as compared with the Long Island, where the people know what they want; they jam in and off as they would on [fol. 98f-266] rapid transit; no elaborate terminal facilities are needed.

Mr. Gardner: Does the time that you took include the drill movements, or were they exclusive of drill movements?

The Witness: That includes drill movements. Of course, a corresponding analysis can readily be made by taking the drill movement situation, and taking the figures and separating them, and taking the train moves alone. But the bulk of the time is train time. The total Long Island time is 126 hours and 22 minutes, of which only 11 hours and eight minutes are drill time.

Mr. Gardner: I only wanted it because Mr. Rawson wanted it clarified.

The Witness: I want to get the facts, that it does not disturb the substantial correctness of my analysis. Of the Pennsylvania total time is 236 hours and 17 minutes, and the drill time is 58 hours and 39 minutes; much more drill time for the Pennsylvania than for the Long Island, notwithstanding the disparity in the number of trains.

By Mr. Hotchner:

Q. Drill is another word for switching in this connection?

A. Yes sir.

Q. Have you finished your examination and analysis of these exhibits?

A. I have.

[fol. 98f-267] Q. What is the importance, in your opinion, of having the rental fixed on a proper basis?

Mr. Gardner: I object to that. That goes away beyond this.

Exam. Sullivan: I cannot see myself just what the effect of it is. Rental should be fixed on a proper basis anyway, and that is what the contention is, the applicant contending it is a proper basis, and the intervener that it is not. I don't see that that would add anything.

Mr. Hotchner: I won't press it, but did you intend I should give my answer?

Exam. Sullivan: No, I will sustain the objection.

By Mr. Hotchner:

Q. What else have you to say, if anything, that you think would be of interest or of value in this situation?

A. I think I have covered generally as compactly as I could under the circumstances, the situation.

Mr. Hotchner: That is all.

Cross-examination.

By Mr. Gardner:

Q. Doctor, do I understand your theory and its conclusion to be that the Long Island should have built another and different type of station originally for its own use?

A. No sir, that is not my contention.

[fol. 98f-268] Q. Then is it your contention that the Pennsylvania station having been built and existing as it does today, that the use of trackage in the terminal should be limited to 6/21 of the existing trackage?

A. Under the conditions that there prevail now, yes sir. That is my conclusion.

Q. And that conclusion is either based or fortified by your theory that the operation of the Hudson & Manhattan is comparable and entirely similar to the operation which is necessary to serve the public which the Long Island serves?

A. Only in part. My opinion is principally based on the fact that in reality the great bulk of your business does go over five tracks, and that furnishes or represents the service and the character of service and requirements of the Long Island. Then, of course, I did bring in the Hudson & Manhattan as indicating the type of terminal

and type of facilities that would be needed for the Long Island——

Q. I think my question was whether your conclusion was based or fortified by——

A. I answered that.

Q. And the answer to that is yes to a certain extent?

A. No, it is not. As I gave it, that it is based upon the effect of a comparison of your own company, the Long Island Railroad, in relation to the Pennsylvania, and then I have looked out to other railroads that operate similarly, [fol. 98f-269] and I found what the facts were there, and that the facts there are in harmony with my conclusions as to your own operation.

Q. Well then, what has the Hudson & Manhattan and its service and operation to do with your conclusion?

A. It is a check upon the correctness of my conclusion. I know that the Hudson-Manhattan service and operation is similar to the Long Island, and I find that the costs of the Hudson & Manhattan are about the same costs as I think they ought to be allocated to the Long Island in view of the kind of requirements of the Long Island traffic, and the kind of facilities that are actually furnished to the company.

Q. The Hudson & Manhattan is operated on a headway service, is it not?

A. I think so, close headway in the rush hours.

Q. Have you written a second edition of your book published in 1925?

A. No sir.

Q. Have you substantially modified your views since you wrote that book?

A. I have progressed my views in some respects. I have gone further in a number of rate studies and rate analyses than I had gone at that time. But so far as general principles of valuation are based on rate making and cost studies, I think generally my ideas are the same.

Q. And rate of return?

[fol. 98f-270] A. And rate of return, very much the same.

Q. The Brackenridge idea that you have referred to was a separate station, which could have been originally built, or could be supposed to be built now, wasn't it?

A. Well, Brackenridge used as a check on the Long Island figures that he computed what it would have cost un-

der such a separate layout. His idea was not that a separate station should have been built. His idea is that the costs allocated, properly allocable to the Long Island would be at most, the costs that would have been incurred by such a separate station.

Q. If it had been built?

A. If it had been built. Whereas my check was the actual cost——

Q. I am not asking what yours is now. You have told us half a dozen times, and I want to find out whether you go along with Brackenridge.

A. I think there are two checks available. Brackenridge made one and I made the other. But neither of us urged the separate station. Both of us merely took the measures that would be useful as a check for the proper allocation of Pennsylvania terminal costs.

Q. So I think you have said before "no", when I asked you if you measured the compensation in any way upon the basis of a separate station. You said no, but you did say, [fol. 98f-271] I understood, that you thought that 6/21 of the trackage would be sufficient and should be the measure in the present Pennsylvania terminal of the compensation that the Long Island should pay?

A. That is the track level.

Q. Yes, that is where the tracks are.

A. Yes, and I think——

Q. Is it yes or no? Did I understand you right?

A. Yes, I think that would be——

Mr. Gardner: Then that is all I have to ask you.

By Mr. Victory:

Q. There was much said here about the testimony of Mr. Brackenridge in case 2692 before the Transit Commission. Did not the studies of Mr. Brackenridge show that on the track area the Long Island Railroad occupied solely 12.72 of the total trackage?

A. I remember he computed the trackage area, but I have forgotten the percentage. I think it was all put in in exhibit form in the Transit Commission case.

Q. And so far as the cubic contents of the building was concerned, he made a study of that also?

A. Yes sir.

Q. And he assigned to the Long Island——

Mr. Gardner: I object to this witness testifying to what Mr. Brackenridge testified to in a case before another tribunal.

Exam. Sullivan: Objection sustained.

[fol. 98f-272] Mr. Hotchner: Can we not ask the representatives of the Long Island Railroad what the proportions are in terms of cubic feet?

Exam. Sullivan: That has been asked him and he said he did not know.

Mr. Hotchner: I remember I asked the question.

Exam. Sullivan: He has already testified that he has not figured that and does not know.

Mr. Hotchner: May we ask whether that figure is available, even if he personally does not know? Is the figure available in their records somewhere?

(Informal discussion off the record which was not recorded.)

Mr. Victory: I would like to offer in evidence report of the engineering committee on terminal facilities for the Long Island Railroad on 4th avenue and 33rd street, together with two connecting tunnels to the Long Island Railroad at Long Island City, in the matter of application for approval of trackage agreement into and the use of the Pennsylvania station.

Exam. Sullivan: What engineering committee is that?

Mr. Victory: This is an engineering committee appointed by the Corporation Counsel in the previous case, and this report was admitted in evidence before the Transit Commission in order to show what it would have cost at that time to construct facilities sufficient to accommodate the [fol. 98f-273] Long Island service. Mr. Brackenridge showed that such facilities could have been constructed for $16,747,275, and the report is very complete. It gives full data and so on, and I offer it in evidence. It was accepted in the other case without any objection.

Mr. Hotchner: We join in the offer.

Mr. Gardner: I will ask the object and relevancy of this paper?

Mr. Victory: Because it is one of the contentions of the City of New York that the rental charged to the Long

Island Railroad should not be larger than a fair return on what it would have cost to supply the Long Island service with proper facilities.

Mr. Gardner: And that this paper is offered to show what the substituted facilities conceivably should have been?

Mr. Victory: Could have been.

Mr. Gardner: And that is the basis of what the compensation for those facilities should be?

Mr. Victory: Yes.

Mr. Gardner: I have no objection. I do not of course concede that the facts are proven by it. But I concede that this document shows what their theory is, and the estimates they made.

Exam. Sullivan: So long as you do not object I will admit it as exhibit 33.

(The same was thereupon received in evidence, marked [fol. 98f-274] "Interveners' Exhibit No. 33, No witness," and is forwarded herewith.)

Mr. Victory: I offer in evidence City exhibit 68-A, that is an exhibit in the former case before the Transit Commission which has been referred to here, entitled "Value of volume used by Long Island Railroad in Pennsylvania Railroad Terminal zone 1, station building.

Mr. Gardner: I object to it as irrelevant, incompetent and immaterial.

Exam. Sullivan: The objection will be overruled, and the document described received as exhibit 34.

Mr. Gardner: Note an exception.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 34," and is forwarded herewith.)

Mr. Victory: Now I offer in evidence City's exhibit 68-B in the former case, made up by Mr. Brackenridge, railroad engineer, entitled Computation of value of portion by volume of zone 1, track level used by the Long Island Railroad.

Mr. Gardner: I object to that as irrelevant and incompetent.

Exam. Sullivan: Does your objection go to the fact that you are denied an opportunity to cross examine the party who made this compilation?

Mr. Gardner: No.

[fol. 98f-275] Exam. Sullivan: Merely as to its relevancy and competency here?

Mr. Gardner: Yes.

Exam. Sullivan: Objection overruled, and the statement will be received as exhibit 35.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 35," and is forwarded herewith.)

Mr. Victory: Now I will offer in evidence City's exhibit 68 in the previous case entitled Summary of estimated value of property used by the Long Island Railroad in zones 1, 2 and 3, and interest thereon at four per cent per annum, figured on the proportions shown in the two previous exhibits.

Mr. Gardner: Same objection.

Exam. Sullivan: The objection will be overruled.

Mr. Gardner: Exception.

Exam. Sullivan: The statement will be received as exhibit No. 36.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 36," and is forwarded herewith.)

Mr. Gardner: I suppose it is conceded for clarity that these figures are as of 1923?

Mr. Victory: Yes.

By Mr. Victory:

Q. In the previous rental case before the Transit Com-

[fol. 98f-276] mission, No. 2692, did you make up a statement to show the ratio of the terminal expense to the passenger revenue of the Long Island and of the Pennsylvania Railroad?

A. I prepared a sheet of which that was part B.

Q. And you also in this sheet attempted to show the net terminal cost to the Pennsylvania Railroad?

A. That is correct.

Q. I hand you this paper and ask you if that is the paper referred to?

A. Yes, that is.

Q. And it was in the previous case as exhibit 60?
A. That is right.

By Mr. Gardner:

Q. Are these figures derived from figures prepared by us in other exhibits?

A. Yes. The explanation of the exhibit is given completely in the bottom portion. Mr. Victory just produced that. I have not looked at this for several years and I would not be prepared offhand to say just exactly, but it is explained.

Mr. Gardner: My idea was to find out whether these figures are all figures that we had given you or checked up?

The Witness: I think they all come from figures that you supplied, with analyses, and if any other facts were brought in the source of the facts is explained in the footnote explanation.

Mr. Victory: I offer that paper in evidence.

[fol. 98f-277] Mr. Gardner: No objection.

Exam. Sullivan: It will be received as exhibit 37.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 37, Witness Bauer," and is forwarded herewith.)

By Mr. Victory:

Q. Will you state for what purpose you made up this exhibit and what it purports to show?

Mr. Gardner: Doesn't it speak for itself?

Mr. Victory: No, it requires explanation.

The Witness: The purpose of it and the source, and how it was made up, are all given.

Mr. Victory: That is all.

Exam. Sullivan: If there is nothing further the witness is excused.

(Witness excused.)

Mr. Hotchner: That is all on behalf of the Association.

Mr. Victory: Mr. Rawson, would you take the stand?

Hobart Rawson was thereupon recalled as a witness and, having previously been sworn, further testified as follows:

Mr. Gardner: This is your witness now, I understand. I would like to inquire whether the witness is recalled for cross-examination?

Mr. Victory: The witness is your witness. He certainly may be considered as a hostile witness. However, I want to get some information from him.

[fol. 98f-278] Exam. Sullivan: Is this cross-examination?

Mr. Victory: No, it is examination in chief. I want him to identify a document.

Mr. Gardner: If it is to identify a document, I am sorry I wasted the time to inquire.

Exam. Sullivan: It is understood that he is your witness?

Mr. Victory: Certainly.

Direct examination.

By Mr. Victory:

Q. I hold in my hand a paper purporting to be dated New York, N. Y., February 14, 1923, addressed to Mr. Ralph Peters, president of the Long Island Railroad Company and Mr. Elisha Lee, vice president of the Pennsylvania Railroad, and seems to bear the name of Hobart Rawson, special engineer of the Long Island Railroad Company, general real estate agent, P. R. R., among other names. Do you recall that document or letter?

A. Yes.

Q. Will you state just what the purpose of this report was?

Mr. Gardner: I would like to see the document.

Mr. Victory: In other words, how this report came to be made?

Mr. Gardner: This was one of the exhibits in the other case?

Mr. Victory: Yes.

Q. In this letter it is stated——

[fol. 98f-279] Mr. Gardner: You have to put the document in first.

Mr. Victory: I offer it.

Mr. Gardner: I object to it as irrelevant and immaterial.

Mr. Victory: This is a report made up by representatives of the Long Island Railroad Company and their engineers,

in fact, and addressed to the president and vice president of the company.

Exam. Sullivan: Of the Long Island Railroad Company?

Mr. Victory: Yes.

Exam. Sullivan: And vice president of the Pennsylvania Railroad?

Mr. Victory: They discuss the question as to the proper method of valuing this terminal.

Exam. Sullivan: The objection will be overruled.

Mr. Gardner: Exception.

Exam. Sullivan: The document will be received as exhibit No. 38, and exception to the ruling will be noted.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 38, Witness Rawson," and is forwarded herewith.)

Mr. Victory: The paper speaks for itself.

I would also like to offer what was admitted in evidence in the previous hearing as exhibit 34.

The Witness: That has already been put in this morning.

Mr. Victory: I would like to offer in evidence the paper [fol. 98f-280] admitted in the previous hearing and made up by the Long Island Railroad Company in case No. 2692 which has to do with the estimated cost of facilities in the station zone.

Mr. Gardner: I will object as irrelevant and incompetent to all this line of proof.

Exam. Sullivan: The objection will be overruled.

Mr. Gardner: I take an exception.

Mr. Victory: It is simply a document made up by you.

Mr. Gardner: That does not show that it is relevant and competent. We made up a lot of things under the lash of the Transit Commission.

Exam. Sullivan: The exhibit consisting of two sheets will be received as exhibit No. 39.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 39," and is forwarded herewith.)

Mr. Victory: In relation to the Pennsylvania Hotel, that property which formerly belonged to this company, and also the post office building, there was submitted in the former case a statement by the railroad showing the details of those buildings.

Mr. Gardner: They are putting in as evidence papers that they called for us to prepare and put in, in their case, as part of their evidence. That does not make them competent or relevant. They would raise collateral issues which it would be very unfortunate to have to go into, so [fol. 98f-281] that we are forced, in order to close this case, to let the whole thing slide. I don't know as there is any harm in any of those things, but as collateral issues they ought not to be brought up.

Exam. Sullivan: What is the purpose of this?

Mr. Victory: To show in connection with the details of their property, to show what kind of rights they have, or what the nature of the trackage rights is, and the question of value, and what they have under the Pennsylvania Hotel, and what their relationship from the nature of the facts and circumstances connected with the construction of the post office is. This is their own detail of all of those facts.

Mr. Gardner: They want to put all that in so as to think up something that they may want to say later on.

Exam. Sullivan: What effect does all this have on the question of rental for the facilities to be paid by the Long Island Railroad?

Mr. Gardner: I withdraw the objection.

Exam. Sullivan: It will be received and marked exhibit No. 40.

(The same was thereupon received in evidence, marked "Interveners' Exhibit No. 40, No Witness," and is forwarded herewith.)

By Mr. Gardner:

Q. You testified to there being some 30 seats in the new waiting room of the Long Island. Did that include the seats [fol. 98f-282] in the loading concourse?

A. No. When Mr. Victory was cross-examining me yesterday, I simply mentioned the seats in the space known as the new waiting room of the Long Island Railroad, I think I said there were about 30. I checked that up this morning and find there were 40 and in addition, outside in the concourse there are seats for approximately 60 more passengers. In other words, there are seats for about 100 people in the waiting room, and concourse.

Q. And ample space for new seats?

A. Yes sir.

Q. Is it practicable for the Pennsylvania to permit the continuance of this trackage use and use of the terminal without substantially impairing the ability of the Pennsylvania to handle its own business?

A. Yes, it is.

Q. The Hudson & Manhattan Terminal—where is the Hudson & Manhattan?

A. The Hudson & Manhattan terminal is downtown, fronting on Church street, between Cortlandt and Dey streets.

Q. Where is the Hudson & Manhattan Railroad?

A. The Hudson & Manhattan Railroad runs from this terminal across through two tunnels to Jersey City.

Q. Under the Hudson River?

A. Yes. Then to a connection with the Pennsylvania [fol. 98f-283] Railroad, I think about two miles west of the waterfront at Jersey City, at what is known as Journal Square, where it connects with the Pennsylvania Railroad. There is another branch which runs north along the waterfront on the Jersey side of the river to Hoboken. Then the Hudson & Manhattan also has a line of two tracks with two tunnels under the river from 33rd street, Manhattan down 6th avenue to 9th street; then across that street and Christopher street under the Hudson River, which connects with the line on the west bank of the Hudson River, a little south of Hoboken.

Q. What are the distances, roughly speaking?

A. I guess the longest distance from the Hudson Terminal to Hoboken is not over four miles.

Q. And the operation is a headway operation, isn't it?

A. Yes, it is.

Q. Is the operation similar to the Long Island's in any way, as far as the terminal is concerned?

A. No, I should say not. It is entirely dissimilar. It is much more similar to the rapid transit lines of the City of New York than it is to the Long Island. It is what I would call a fairly rapid transit service.

Q. There are no branches to which the passengers have to be transferred morning and night, as in the case of the Long Island Railroad with their branches east of Jamaica?

A. No.

[fol. 98f-284] Q. What other differences are there?

A. The Hudson & Manhattan is entirely an underground railroad. I might add, for the purpose of clarification, that in connection with the Pennsylvania Railroad the Hudson & Manhattan operates a joint service from the Hudson Terminal in Manhattan underneath the Hudson River to the connection with the Pennsylvania Railroad at Journal Square, and then over the tracks of the Pennsylvania through Manhattan Transfer to Park Place, Newark.

From the Hudson Terminal there are three services, three sets of trains operated. The trains that go to Park Place, Newark, the trains that go partway on that branch to Journal Square and then turn back, and the trains which take the line around to Hoboken. Whereas the Long Island Railroad, from Pennsylvania station, there are probably a dozen or 15 different services operated to different termini at the eastern end of Long Island and fanning out all over Long Island.

Q. A headway service on the Long Island would be impossible into this terminal and out?

A. Yes, it would.

By Mr. Bauer:

Q. The Long Island Railroad trains into the terminal are mostly multiple unit trains, aren't they?

A. Yes.

Q. The same is true of the Hudson & Manhattan service?

A. Yes.

[fol. 98f-285] Q. Into all of its terminals?

A. Yes, all multiple unit trains.

Q. The Hudson & Manhattan has two terminals in Manhattan, the Hudson Terminal and the 33rd street terminal?

A. Yes, it has.

Q. Into both of those stations they are multiple unit trains on a headway service?

A. Yes.

Q. The Long Island operation in the terminal zone is all underground?

A. In the terminal zone, yes.

Q. In that respect it is just the same as the Hudson-Manhattan operation as between New Jersey and the New York terminals?

A. Well, in respect to it being underground, yes.

Q. They are the same with respect to being multiple unit?

A. Yes sir.

Q. During rush hours, so far as operation is concerned in the terminal zone by the Long Island, you get through there as many trains as you can, is that right?

A. Yes.

Q. There is during rush hours, virtually no difference, is there, between operating on the one basis or time table basis, is there?

A. Yes, indeed, there is——

Mr. Gardner: Let him answer.

[fol. 98f-286] Mr. Bauer: Let me state the question.

Q. So far as operation in the terminal zone is concerned?

A. Yes, there is a great deal of difference.

Q. What difference is there?

A. With your scheduled service to many points, your trains must leave from stated platforms at stated times. A passenger going to Long Beach from the Pennsylvania station expects to find his train which is scheduled to leave at 5:30 on a certain platform, and that train must leave from that platform at 5:30. With your headway service, with only two or three destinations, the people all come down on one platform, or maybe one or two platforms, and the trains come along in succession, and they wait for their train and board it there. It does not make any difference in what rotation they follow each other.

Q. But with respect to the number of trains that you are getting through, you are getting through the tunnel virtually the maximum number of trains that you can get in during the rush hour in the morning and out in the evening, so far as the terminal zone is concerned, isn't that true?

A. Yes. But the fact of having to have scheduled service from designated platforms in a way limits the number of trains that you can operate, because you have got to feed them into your tunnels from different tracks.

Q. How many trains can you get in the morning during [fol. 98f-287] the rush hours through the Long Island tunnel to the Pennsylvania station?

A. We are now operating, I think 25 between 8:00 and 9:00 in the tunnel.

Q. Through the single tunnel?

A. Through the single tunnel, and 11 through the other tunnel, making a total of 36.

Q. If the other tunnel were not available, could you operate more trains under a time table schedule in that single tunnel?

A. Not with the present facilities at either end, no.

Q. You mean those platform facilities?

A. Those platform facilities and yard facilities.

Exam. Sullivan: Is that a double track tunnel?

The Witness: It is two single track tunnels. Each tunnel is in one tube by itself.

Q. Do you know how many trains the Hudson & Manhattan get through a single tunnel during the rush hours in its headway service?

A. The Hudson & Manhattan schedules 40 trains an hour.

Q. Gets through 40—does it get through 40?

A. I think there is some doubt as to whether it gets that number through day in and day out. We have investigated that from time to time and reports we receive are that there is some doubt that they make that number of movements regularly for a complete 60 minute period. They may make [fol. 98f-288] at the rate of 40 trains an hour for 30 or 15 minutes, but for the full 60 minute period, as I say, we found that there was quite a variation between what they were supposed to do and what they actually did get.

Q. The practical maximum comes somewhere between 30 and 35, doesn't it?

A. No, I think between 35 and 40.

Q. That is more than the Interborough gets by Brooklyn Bridge or at Times Square?

A. That is because the Interborough's line is a good deal longer. They make many more intermediate stops, and those station stops slow up the service.

Q. How many more trains could you get through your tunnel if you were operating, with your present station layout, in zone 1, if you had a headway service, instead of a time table service?

A. I think we could get 30 trains an hour through the tube.

Q. So the difference between the time table service that you have and the headway service that you get through with present station facilities would be the difference between 25 and 30?

A. Yes.

Q. What is the number of trains that you get in through a single tunnel on the Pennsylvania from the New Jersey side during the heaviest period of operating during the day?

A. I should say that 15 is the maximum. I don't know [fol. 98f-289] that there are that many regularly. There the service varies a great deal. What I mean is they are apt to run additional sections of trains on special days and special occasions. But I think in normal daily service that 15 would be a maximum.

Q. And then it is shifted down to an average during the day of what?

A. Not more than four or five an hour.

Q. So in taking the Long Island service and comparing it on the one hand with the Hudson & Manhattan, you have a relation of 25 to about 35 trains during rush hours, compared on the other hand with Pennsylvania service where you have a maximum of 15 trains per hour?

A. That is the maximum that is operated, not the maximum which might be operated.

Q. That is what is actually operated, and further than that, even if you had a headway service, you could get in about 30 as compared with 25 on your present basis?

A. Yes.

By Mr. Gardner:

Q. You could not loop them around and serve various branches on a headway service in the terminal?

A. No.

Mr. Gardner: That is all.

Exam. Sullivan: You are excused.

(Witness excused.)

[fol. 98f-290] Exam. Sullivan: Is there anything further?

Mr. Victory: I would like to introduce section 148 of the

Railroad Law of the State of New York to the effect that an agreement such as this must be approved by the Transit Commission.

Mr. Gardner: We had better have the exact text.

Exam. Sullivan: Will you submit it for the record within 10 days?

Mr. Victory: Yes sir.

Exam. Sullivan: Do counsel desire to file briefs in this case?

Mr. Gardner: I do.

Mr. Hotchner: Yes.

Exam. Sullivan: All briefs will be due by September 3rd, and no reply briefs may be filed.

The hearing is closed.

(Whereupon, at 1:00 P. M., July 19, 1929, the hearing in the above matter was closed.)

[fol. 98f-291] EXHIBIT 18

[fol. 98f-291-1] STATE OF NEW YORK TRANSIT COMMISSION

Case No. 2754

In the Matter of the Application of THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA TUNNEL AND TERMINAL RAILROAD COMPANY, and THE PENNSYLVANIA RAILROAD COMPANY for the Approval of an Agreement for the Trackage Rights Into and the Use of the Pennsylvania Station in the Borough of Manhattan, City of New York

Appearances:

Hon. Louis W. Stotesbury, Counsel to the Transit Commission, by George H. Stover, Esq., Assistant Counsel.

Hon. George P. Nicholson, Corporation Counsel for The City of New York, by Vincent Victory, Esq., Assistant Corporation Counsel.

Alfred A. Gardner, Esq., Counsel, and Joseph F. Keany, Esq., General Solicitor for The Long Island Railroad Company.

Messrs. O'Brien, Boardman, Parker & Fox, Attorneys for the Pennsylvania Tunnel and Terminal Railroad Company, by Philip W. Boardman, Esq.

Maurice Hotchner, Esq., General Counsel for the Association of Long Island Commuters.

Opinion

HARKNESS, Commissioner:

This is a proceeding involving the question of the approval of a lease agreement between The Long Island Railroad Company and the Pennsylvania Tunnel and Terminal Railroad Company and the Pennsylvania Railroad Company, as agent, covering the use by the Long Island Company of the Pennsylvania Terminal in the City of New York. For the sake of brevity these companies are respectively referred to in this opinion as the Long Island Company, the Terminal Company and the Pennsylvania Company.

In approaching the consideration of this lease agreement it will be helpful briefly to outline the history of this terminal and of the transactions between the several companies.

First, as to the relationship of the companies. Title to the terminal property is in the Terminal Company, of which company the Pennsylvania Company owns all the capital stock. Similarly, the Pennsylvania Company owns all but a small fraction of the capital stock of the Long Island Company.

The Pennsylvania Station, together with tunnels under the Hudson River from New Jersey and the tunnels extending under the Borough of Manhattan and the East River to and into the Borough of Queens, referred to generally as the Pennsylvania Terminal, were constructed in the years from 1903 to 1910. In building the Pennsylvania Terminal east of Tenth avenue provision was made for the accommodation of trains of the Long Island Company. This provision consisted generally of allowing the Long Island Company the use of the tracks in the tunnels (other than those extending under the Hudson River) together with space in the station building. At the outset it was evidently contemplated that the use of the station by the Long Island Company would be minor as compared with that of the Pennsylvania. Four of the most northerly tracks under the station were allocated definitely to the

Long Island Company; and a waiting room and approaches on the Thirty-Fourth Street side of the station were provided for Long Island passengers. With the great expansion in Long Island Railroad traffic other tracks in the station have been thrown open to use by the Long Island trains.

[fol. 98f-291-2] After the terminal was placed in operation in September, 1910, an agreement was entered into between the several companies covering the use of the facilities to be enjoyed by the Long Island Company. This agreement was approved by the Public Service Commission for the First District on March 14, 1911, and provided generally that the Long Island Company should pay a share of operating expenses, maintenance, taxes, etc., in the proportion that its use of the facilities bore to the total use. This proportion was arrived at on the "wheelage" basis; that is, the Long Island Company was to pay in the proportion that the number of cars operated by it in the terminal bore to the total number of cars operated therein.

The agreement, as negotiated in 1910, further provided that the Long Island Company should pay in addition a share of the interest on the investment in the joint facilities at the rate of four and one-half per cent per annum. This interest item was also apportioned on the wheelage basis.

This general arrangement has continued in force from that time on except as to the interest item. It became apparent that the Long Island Company in the then state of its earnings could not afford this heavy interest payment, which alone would have amounted to about $1,000,000 a year. The matter was therefore adjusted between the companies through several modifying agreements, as follows:

Agreement dated June 24, 1912 (approved by the Public Service Commission for the First District on October 18, 1912) set the interest charge payable by the Long Island Company at $156,000 a year. This agreement was extended from time to time by various orders. A supplemental agreement dated May 26, 1920 (approved by the Public Service Commission for the First District on July 1, 1920), increased the interest charge to $240,000 a year. A further supplemental agreement dated April 20, 1922 (approved by the Transit Commission on August 23, 1922) increased the interest charge to $300,000 a year.

By a proposed agreement negotiated between the companies in 1923 (disapproved by the Transit Commission in Case No. 2692), the other bases of apportionment were left generally the same as theretofore, but provision was made for the Long Island Company to pay its proportion of the interest at the rate of four per cent upon $83,306,191, the estimated amount of the investment in the joint facilities other than the electrical distributing system on which interest was fixed at the rate of four and one-half per cent. This would have raised the interest figure from $300,000 a year to one that would approximate $1,327,000 for the year 1923.

It might be noted here that similar joint facilities arrangements have been entered into between the Pennsylvania companies and other railroad companies also using the Pennsylvania Terminal, namely: The New York, New Haven and Hartford Railroad Company, the Baltimore and Ohio Railroad Company, and the Lehigh Valley Railroad Company. These companies all pay interest at the rate of six per cent.

The following is a statement of the various amounts of rental paid by the Long Island Company beginning in 1911 and extending to and through the year 1923:

[fol. 98f-291-3] Transit Commission Case No. 2692, Topic No. 14, Exhibit No. 23

Statement of Amounts Paid by the Long Island Railroad for the Use of the Pennsylvania Terminal, 1911 to 1923

Year	Joint facility operating expenses	Taxes	Rental on power facilities	Fixed rental	Credits acct., station privileges, rentals, etc.	Total	Power	Direct operating charges	Grand total
1911	183,214	.....	.....	300,000	11,567	471,647	26,970	20,556	519,173
1912	203,454	119,516	15,108	228,000	41,590	524,488	48,434	22,428	595,350
1913	223,417	229,122	26,616	156,000	72,241	562,914	52,963	24,118	639,995
1914	214,575	247,806	29,813	156,000	83,789	564,405	63,253	25,821	653,479
1915	266,365	262,922	31,732	156,000	78,141	638,878	26,684	22,875	688,437
1916	305,362	297,588	32,615	156,000	87,443	704,122	27,350	23,735	755,207
1917	375,177	306,675	33,365	156,000	96,377	774,840	50,066	30,370	855,276
1918	549,993	358,699	34,568	156,000	117,899	981,361	60,524	47,810	1,089,695
1919	709,856	354,931	34,015	156,000	137,375	1,117,427	73,171	64,444	1,255,042
1920	886,511	388,889	36,673	198,000	169,969	1,340,104	102,083	67,872	1,510,059
1921	807,370	540,223	41,153	240,000	181,067	1,447,679	103,331	37,533	1,588,543
1922	826,818	570,640	39,598	270,000	254,347	1,452,709	127,483	79,973	1,660,165
1923	930,336	595,305	42,793	300,000	252,987	1,615,447	113,602	82,975	1,812,024

[fol. 98f-291-4] On July 13, 1923, the Long Island Company and the Terminal Company instituted a proceeding (Case No. 2692) by filing an application for the approval of a proposed agreement between the companies, dated June 29, 1923. A hearing was held on such application on September 5, 1923, but was adjourned subject to call pending a careful investigation by the staff of the Commission into all the features of the joint operation of the terminal property. The hearings were resumed on September 3, 1924, and proceeded from time to time until November 6, 1924, during which 1,784 pages of testimony, together with exhibits, very voluminous for the most part, were taken. The application of the railroad companies was vigorously resisted by the Corporation Counsel appearing for The City of New York as well as by counsel for several civic associations.

In the light of all the evidence that was taken, the Commission, on January 23, 1925, adopted an order denying the application of the companies and disapproving the agreement then under consideration. In this respect the action of the Commission was unanimous. Commissioner O'Ryan filed an opinion reviewing the testimony and the points in controversy at considerable length, and indicating a possible basis for a substitute agreement. In common with the Chairman of the Commission I believed it unwise at that time, at least, to go into such particularity with respect to the terms of a new agreement, stating that in so doing it seemed to me the Commission would go beyond its proper province and encroach upon a field that belonged, in the first instance, to the railroad companies. The decision of the Commission, therefore, was unanimously in favor of the disapproval of the agreement, and a majority of the Commission united in confining itself to that disapproval with a brief statement of the main ground therefor. In the majority opinion it was stated:

"The main grounds for disapproval, as I see them, are that the proposed agreement fails adequately to take into consideration the proposition that a large part of the carrying costs of the Pennsylvania terminal should be carried by the Pennsylvania Railroad system; and that sufficient account is not taken of the factor that the quantity and quality of the space in the terminal used by the

Long Island Railroad Company is much less than that used by the Pennsylvania Company.

"It is entirely fitting that one of the great railroad systems, like the Pennsylvania, should have an imposing terminal such as it has in the first city in the country. It is in keeping with the standing and prestige of the Pennsylvania, and its costly construction can be justified by the indirect benefits that are felt throughout the Pennsylvania lines. Even if it were possible—which it is not—for the Long Island Railroad Company to raise the funds necessary to build a terminal on any such scale, such action on its part would be most improvident. The Long Island Railroad is not a wealthy railroad, as that term is usually understood, nor are its lines extensive enough to justify it in doing what would be entirely proper in the case of lines like the Pennsylvania and the New York Central. * * *

"On the score of space, although it is exceedingly difficult to fix an exact measure, it should be recognized that the space in the terminal assigned to the Long Island Railroad Company, and generally in constant use by its passengers, is not only less in quantity than that used by the Pennsylvania, but is on a much less elaborate scale."

Following this action by the Commission, the railroad companies on March 21, 1925, submitted a revised form of agreement for approval. This agreement generally followed the lines of the previous form with numerous, but relatively unimportant, changes in phraseology designed to overcome objections made during the course of the previous hearing with one marked change intended to meet the grounds of disapproval stated by the Commission in acting on the earlier application. This change was that the entire cost of the Pennsylvania Station building above the track level, together with the operating expenses and taxes identified therewith were withdrawn from the joint account, thus relieving the Long Island Railroad from paying rental, including interest, taxes and operating expenses, upon that portion of the joint facilities. In effect the railroad companies modified the previous agreement so as to take this position: If the Transit Commission objects to the previous agreement because of the alleged monumental character of the Pennsylvania Station, we will withdraw this question from controversy by entirely eliminating all

charges for the use of the station above the track level. This involved a withdrawal from the investment cost of $15,000,000, that being assumed to represent the cost of such portion of the station building. Coupled with this change, however, was another change increasing the interest rate on the joint facilities from four and four and one-half per cent as in the previous agreement, to five per cent.

[fol. 98f-291-5] Public hearings upon the modified agreement began on April 2, 1925, and were concluded on April 24, 1925, during which 369 pages of testimony were taken and 13 exhibits introduced. As before, the new agreement met with active opposition.

It will be convenient here to set out just what this controversy involves in dollars and cents. Pending a decision on this application, the rental account is based on the 1912 agreement as supplemented by that of 1922, whereby the interest figure was increased to $300,000 a year. Taking the accounts for the year 1923 as a basis, the 1922 arrangement would involve the payment by the Long Island Company of a gross rental of $1,812,024. Under the proposed agreement disapproved in Case No. 2692, the gross rental for 1923 would be $2,872,724. Under the revised agreement now under consideration and still using the year 1923 as a basis, the gross rental would be $2,519,800.

In the hearings both on this and on the previous application, consideration was not restricted to the interest account, but extended in great detail to all items entering into the expense of joint operation. Objections were lodged and vigorously urged against the wheelage basis, the apportionment of maintenance expense and taxes, power costs, and practically every item of the joint expense.

With a petition of the Long Island Company pending before the Public Service Commission and the Transit Commission for an increase in its commutation rates, the fear was expressed throughout this proceeding that action by the Transit Commission favorable to the contentions of the railroad companies in this rental matter would be availed of by the Long Island Company in the commutation case as an important link in its chain of evidence to support an increase in rates. The attention of opposing counsel evidently went far afield from this rental case and into the possible effect of a decision herein upon the rate

case. With that element in the situation, it was not unnatural that consideration was not confined to the narrower question of the relative equities between the several companies in the matter of the joint operation of the Pennsylvania Terminal. Whatever may be the aims and purposes of opposing interests, it is plainly the duty of the Commission to consider this rental case now pending before it solely upon its merits and to do justice to all concerned without reference to other litigation.

The wheelage basis has been attacked principally on two grounds: First, that it does not reflect an equitable distribution of expense in view of the different quality and quantity of space used by the several companies; and second, that it does not take into account the different type of operation maintained by the Long Island Company.

As indicating its position, the City suggested two rental arrangements. The first was based upon a hypothetical terminal constructed solely for the Long Island Company at 33d Street and 4th Avenue of a type generally similar to the Hudson Terminal Building; and the second was based upon a rather rigid allotment of space in the Pennsylvania Terminal (including the tunnels) to the Long Island Company with the rental computed on that space.

With respect to the first of these bases, it may be said that it has all the weakness of the hypothetical as against the actual. It is not a question of what might have been done; it is a question of what could have been done. The Long Island Company could not have financed the construction of such a terminal with its tunnel approaches, and its entry into Manhattan as a matter of actuality was dependent upon its needs being incorporated in the plans for the Pennsylvania Terminal backed as it was by the financial strength of the Pennsylvania System. This was the only way, practically and actually, that the Long Island passengers could get this great additional service. One of the greatest railroad improvements in the country is thus made available to them only because of the controlling ownership of the Long Island by the Pennsylvania Company.

As access to Manhattan for the Long Island Company and its passengers was possible only as a part of the Pennsylvania improvements and as those improvements were

approved by public authority, I consider that it would be unfair at this late date to attempt arbitrarily to fix the Long Island Company's rent upon a hypothesis that never could have actuality. Furthermore, railroads are as entitled as individuals are to be judged on foresight; not hindsight. There is no question of the entire good faith of the companies in initiating and carrying out the Pennsylvania improvements. Even if it be admitted that a more economical operation could now be worked out on the basis of the hypothetical plan suggested by the City, nevertheless as the companies used reasonable foresight and acted in good faith, they should not now be penalized by the application of a hindsight that would involve the destruction of much that they accomplished.

[fol. 98f-291-6] The second plan suggested by the City involves a rather rigid allotment of space in the Long Island Company. One set of the East River tunnels would be turned over solely for Long Island use together with part of the station. Without reference to the exact rental figure that might be produced, a rigid space basis is decidedly objectionable from the standpoint of service. As matters stand now, the Long Island Company uses one set of the East River tunnels completely and also sends additional trains back and forth through the other set. Similarly, in the station, it not only uses the four tracks definitely allocated to it but to an increasing degree uses tracks in other parts of the station. This is as it should be. The Long Island traffic is so tremendous and is increasing so fast that the needs of its patrons require the utilization of all the space and facilities that can be spared by the Pennsylvania and the other companies operating into the terminal.

If the rental arrangement were held down to a rigid space basis predicated on past performance, the tendency would be for the landlord to restrict the tenant to just that space and to just those facilities. Otherwise the tenant would be getting more than it paid for. In acting on these matters, the Commission as a regulatory board must keep in mind not only the narrower question of any given rental arrangement but the broader aspects of service and proper operation. Assuming that it would be possible by the adoption of a space basis to obtain a somewhat lower rental

payment by the Long Island Company, that course might and probably would turn out to the heavy disadvantage of Long Island Railroad passengers because the tendency would be to restrict service. The congestion is so great on all lines entering the City that it is the policy of the Commission to do its utmost to secure expansion in terminal facilities, and by added facilities to give greater service. The space plan presented by the City because of its rigidity and the tendency to curtail needed additional service conflicts with the policy of the Commission, and is therefore unacceptable to it.

As indicating the need for expansion, reference was made several times during the hearings to contemplated improvements in the Pennsylvania Terminal, and in the Flatbush Avenue Terminal in Brooklyn costing many millions of dollars that will permit of very substantial increases in Long Island Railroad service. The Commission expects that with respect to these improvements it will have the earnest cooperation of the railroad companies. In the light of such a situation, it would be most unwise from the standpoint of the needs of Long Island passengers to adopt a rental policy that would absolutely be at variance with the principle of expansion.

As against this, the wheelage basis of apportionment has the great advantage of flexibility. Charges go up or down as the service increases or diminishes, and there is therefore no inducement to the landlord to restrict the operations of the tenant.

As has already been stated, the wheelage basis has been adopted in agreements with the New York, New Haven and Hartford, the Baltimore and Ohio, and the Lehigh Valley Railroad Companies that also operate into the terminal. So far as the wheelage basis as a matter of general application is concerned, this fact is important. One reason for the close scrutiny that has been given the Long Island rental is that, if we disregard the fact of separate corporate entities, the Long Island and the Pennsylvania practically are one. As the Pennsylvania Company is the controlling element, it might impose its will on the Long Island Company irrespective of the real interests of the latter company. There is no such relationship between the Pennsylvania and the other outside companies using the ter-

minal. They deal at arm's length and presumably would not have agreed upon the wheelage basis if it were not generally a fair method of apportionment.

In this connection it should be stated that nothing has developed in these hearings to question the good faith of the officials of the Pennsylvania and Long Island Companies in negotiating this agreement. Any loose talk of the Pennsylvania "milking" the Long Island Company is unsupported by a scintilla of evidence. On the contrary, the Commission during the time this matter has been before it has been impressed with the business judgment and evident fairness displayed by the officials of both companies. The issues involved in this proceeding can therefore be considered solely on their merits without complicating them by questioning the motives of any one concerned.

The nub of the controversy over the wheelage basis seems to be this:

The method of operation of the other companies using the terminal differs from that maintained by the Long Island Company. Generally, the Long Island operation is [fol. 98f-291-7] confined to the use of multiple unit cars; that is, self-contained motor cars with some trailers but without electric locomotives. The other companies use standard steam railroad and Pullman coaches drawn in and out of the terminal by electric locomotives.

On the one hand the companies claim that a variation practised by them in applying the wheelage basis reacts heavily in favor of the Long Island Company in that each electric locomotive is counted as three cars; also that the Long Island Company is favored in the use of the storage yard just west of the station proper and in not having to have its trains counted as do the other companies in going to and returning from the Sunnyside Yard in the Borough of Queens.

The contestants minimize these alleged elements of benefits and earnestly urge that the factor of the longer and heavier cars generally in use by the Pennsylvania and the companies other than the Long Island Company not only offsets these supposed advantages but weighs the situation down very heavily to the disadvantage of the Long Island Company.

After listening to the wealth of evidence that has been introduced on this question and after the most thorough discussion it has had during the hearings, I have come to the conclusion that the claimed benefits and detriments about offset each other, and that while the wheelage basis may not be ideal it nevertheless has the virtue of flexibility and is probably the most practical, common sense method of apportionment that can be used. It has been in force as between the Long Island and the Pennsylvania Companies since 1910 and, seemingly, until the 1923 agreement was negotiated—involving as it did an increase of about a million dollars a year on the interest item—was unquestioned except in one case. It seems to have been incidentally involved in the case of Dick et al. against the Pennsylvania R. R. Co. et al. (reported in the New York Law Journal for March 22, 1917) in which, after considering the matter, Mr. Justice Lehman said that: "as between the Pennsylvania Railroad and the Long Island Railroad the actual division of expenses is entirely fair to the Long Island."

Objection was also made by the contestants that the rent bill of the Long Island Company would be increased as it made greater use of the terminal. It seems to me that in common fairness it should. If the Long Island Company today, for example, should run one hundred trains into the terminal and tomorrow should run one hundred and fifty trains, why should it not pay the additional cost of operation that a fifty per cent increase in traffic would entail? In hearing this case, I have been impressed a number of times with the feeling that in the zeal to keep this rental down consideration seemed to be lost of certain elemental principles of fair dealing. The same rules of fair dealing that apply between man and man in ordinary business engagements must apply between corporations, whether they be railroad companies or otherwise. If the Long Island Company makes an increasing use of the Pennsylvania Terminal, the basic factor of simple fairness requires that it pay correspondingly.

It has also been urged that if the New York, New Haven and Hartford, the Baltimore and Ohio, and the Lehigh Valley Railroad Companies retire from the Terminal, as is indicated as a probability, the wheelage basis would not afford a fair division as between the Pennsylvania and the

Long Island Companies. On this it is sufficient to say that the agreement now submitted only lasts for a year, and if this question should become acute or of large importance, it can readily be dealt with subsequently.

One further question remains with respect to operation. The Corporation Counsel put a witness on the stand whose testimony would seem to indicate great waste in the operation of the power house and distributing system. It is easy enough in this era of rapid improvement in power house design and operation to pick flaws in the operation of existing plants on somewhat theoretical grounds. Furthermore, the City's witness on this question did not impress me as having the ripened judgment and the experience and freedom from partisanship necessary to make his testimony convincing. Nevertheless, the Chief Engineer of the Commission has been directed to make a careful survey of the power plant and distributing system with a view to ordering any necessary changes.

This brings us to the other main branch of the case—the so-called "monumental" feature that was dealt with in the Commission's opinion in Case No. 2692. Does the modification suggested by the companies of eliminating the investment and other costs of the station building above the track level fairly meet the Commission's criticism of the earlier agreement?

[fol. 98f-291-8] The contestants claim that it does not on several main grounds. The first of these is that the elimination of the building costs and expenses does not entirely eliminate the monumental feature, because (1) the track lay-out is unduly elaborate from the standpoint of the Long Island Company, and (2) that there is a greater distance of track than is necessary because the Long Island Station should have been located at Fourth Avenue.

With respect to these objections, it would seem that the track lay-out is in accordance with reasonable foresight and judgment for the type of joint operation intended. Too often, in great public works, the mistake is made of failing to provide adequately for future expansion. When a railroad company goes into the tremendous investment that is involved in building a terminal in New York City, sound business judgment would dictate that while the work was being done the terminal should be made large enough to

take care of reasonable future requirements. A point is also made that if a less elaborate building had been constructed on this site the real estate and track construction would not have been so costly. In answer to questions on this point, however, the City's main witness stated that in any event the tracks would occupy substantially the same amount of superficial area. That disposes of the real estate feature. He also stated that the cubic yardage of excavation would be around two thirds of that involved in the present construction. In the light of this testimony, I do not see that the companies could fairly be required to increase the deduction of $15,000,000 from the capital account.

The claim as to the length of track is already disposed of by what has been written earlier in this opinion about the hypothetical terminal at 33rd Street and 4th Avenue.

It is strongly urged by the Corporation Counsel that the Pennsylvania Company did not expect to get a direct return from the tunnel and terminal investment. In support of this contention there was introduced in evidence a communication dated May 5, 1902, from Mr. A. J. Cassatt, then President of the Pennsylvania Company, to the Board of Rapid Transit Railroad Commissioners. This communication asked for the grant of the necessary rights for the Pennsylvania improvements, and the part of it pertinent to this discussion is:

"As the purpose of the company is to furnish terminal facilities for the Pennsylvania Railroad system and for the Long Island Railroad, and not to engage in intra-city traffic, and in view of the fact that there will not be any direct return from the additional investment in the proposed extension, a franchise tax in the ordinary sense and based on earnings, either gross or net, could not well be applied."

Does the statement that "there will not be any direct return from the additional investment in the proposed extension" mean as contended by the Corporation Counsel that the terminal was never to be put on a self-supporting basis? Such a policy would be so contrary to general railroad and business practice that I would require the clearest

and most convincing proof of such a commitment. That degree of proof is not furnished by Mr. Cassatt's letter, which is susceptible of a much simpler and more reasonable explanation. The terminal improvements extend generally from back of the Bergen Hills in New Jersey to and including the Sunnyside Yard in the Borough of Queens. No local service is provided along that stretch of railroad, and therefore in the sense in which the term is generally understood there "could be no direct return" from it; i. e., fares collected for a ride solely on the extension. This is the logical and natural meaning of the phrase, and the one that must be applied to it in the absence of convincing evidence to the contrary.

During the hearings there was considerable discussion of the action of the Pennsylvania Company in charging off fifty per cent of the cost of the terminal improvements to profit and loss account, and the Corporation Counsel cites this as justification of his claim that the Pennsylvania Company did not expect to get a direct return from the terminal investment. The evidence shows that after the terminal was built the Pennsylvania Company did charge off fifty per cent of its cost. The reason given for this by Vice-President County of the Pennsylvania Company was that the directors looked forward to the terminal not being fully productive for a number of years and believed it to be proper and conservative financing to charge off part of its cost and thereby avoid accruing large paper deficits over a course of years. During the hearing the Corpora- [fol. 98f-291-9] tion Counsel endeavored to go at some length into the minutae of this transaction and I excluded that evidence. The salient fact, for what it is evidentially worth, is that fifty per cent of the cost was charged off. The details do not make any difference because when all is said and done the transaction itself does not affect the real situation. The Pennsylvania Railroad put so much money into the terminal. On that investment, under elementary principles of law, it is entitled to a fair rate of return. With the amount of the capital investment established, it makes no difference what stocks and bonds are outstanding or what the book accounts show.

It would be making a most remarkable assumption to conclude on the basis of the paragraph of Mr. Cassatt's

letter quoted above and the action of the Pennsylvania Company in charging off part of the cost to profit and loss that that company never intended to earn a fair rate of return on the terminal investment—in other words, that the company, in effect, intended to make a free gift of all or a large part of it. That assumption would be so extreme that it must be rejected. As stated above, the language used by Mr. Cassatt is susceptible of a simpler and more reasonable explanation. Furthermore, Mr. County's statement of the reasons for charging off part of the cost is logical and reasonable and is in accord with conservative financial management.

The final point made by the contestants against the proposed modified agreement is with respect to the interest rate. The agreement negotiated in 1923 and disapproved in Case 2692 specified an interest rate of four per cent on the general investment and four and one-half per cent on the power system. In the agreement now under consideration these rates are raised to a flat five per cent.

Tabulations were introduced in evidence giving information as to what the money actually cost the Pennsylvania Company during the construction period, and Vice-President County testified that taking the average and adding certain financial costs the figure would be brought close to five per cent. If this were all there were to the question a strong case would be made for the five per cent rate, especially as it is fortified by the fact that six per cent is charged under the trackage agreements with the New York, New Haven & Hartford, the Baltimore & Ohio and the Lehigh Valley Railroad Companies and that the same rate is provided for in a proposed similar agreement between the Pennsylvania Company and the Terminal Company.

But I think the five per cent rate should be disapproved and the interest rates specified in the 1923 agreement reinstated for another reason. By incorporating the four and the four and one-half per cent interest rates in the 1923 agreement, the Pennsylvania Company committed itself to what is believed, under all the circumstances, to be fair rates to the Long Island Company. The Transit Commission disapproved the 1923 agreement, not because of the interest rates, but because of other features as indicated in its opinion. Thereupon the companies endeavored to

meet the point of the Commission's criticism by withdrawing the great part of the station costs and expenses from the joint account. As a result of the hearing in this case and of a study of the evidence both in this proceeding and in Case 2692, I am prepared to recommend the acceptance of this concession as a fair adjustment. But the action of the companies in raising at the same time the interest rate one per cent on all the rest of the investment, except the power system, and one-half per cent on the power system robs that concession of a great deal of its value. The concession made by the Terminal Company in respect to the investment in the station building is no more than enough to meet the Commission's previous objections and the companies should be held to it to the full instead of suggesting a compromise that might have the appearance of conceding a substantial modification on the one hand while drawing back a good part of it on the other.

Finally, there remains the question of the date when the lease agreement shall take effect. The 1923 agreement was submitted to the Commission on July 13th, 1923. The companies were prepared at all times to go ahead with the case and presented all the evidence the Commission required freely and promptly. The long and unusual delay in reaching a final decision may fairly be said to be from causes beyond the control of the companies.

In general, the Commission is opposed to allowing agreements to be made retroactive. But that policy is, as I conceive it, based upon the type of case where an agreement is filed with the request that it be made effective at some date prior to the date of filing—the usual case of action nunc pro tunc.

It might be claimed that as the agreement submitted in 1923 was disapproved by the Commission the companies were responsible for the delay involved in that proceeding. [fol. 98f-291-10] But in all fairness the Commission must concede that for various causes that cannot be ascribed to the companies, the time consumed in the hearings and in making the decisions was most unusual. The main witness produced by the Corporation Counsel conceded on the stand that the rental basis recommended by him should be made retroactive. I cannot see any distinction in principle

as to the retroactive feature whether one rental basis or another be adopted.

Under these special circumstances I believe it only just that the rental agreement be permitted to take effect from and after July 1, 1923.

The gross rental charge on the books of the companies for the year 1923 upon the basis of the last approved agreement (that of 1922) is $1,812,000. This decision, using also the 1923 accounts as a basis, will permit of a gross rental of approximately $2,232,000, or an increase of $420,000 over the old. As against this the companies contended for a gross rental that, at the five per cent interest rate and also using the 1923 accounts, would amount to $2,519,800. It seems to me that under all the circumstances the middle figure, coupled with the permission to readjust the accounts back to July 1, 1923, does substantial justice to all concerned.

In the course of the hearings reference was made to an item for accrued deficits in operating expenses and taxes on the books of the Terminal Company amounting in the net to $3,070,384. The Pennsylvania Company indicated a willingness to cancel this item as an uncollectable debt of the Terminal Company so that it might start under the new agreements with a clear account. The Commission expects this item to be charged off.

At the same time the rental agreement between the Long Island Company and the Terminal Company was submitted, a generally similar agreement between the Terminal Company and the Pennsylvania Company was also submitted. The whole subject of the operation of the Pennsylvania Terminal was so throughly threshed out in this proceeding and in Case No. 2692 that I believe no useful purpose would be served by a separate hearing on the rental agreement between the Terminal Company and the Pennsylvania Company. That agreement may therefore be approved.

There are numerous other questions that were suggested and discussed in the course of the two hearings on the Long Island agreement; but the foregoing I believe contains ample discussion of the main points.

I therefore recommend the adoption of orders in conformity with this opinion.

McAneny, Chairman, and O'Ryan, Commissioner, concur.

[fol. 98f-292-1] TRANSIT COMMISSION, STATE OF NEW YORK

Case No. 2782

In the Matter of the Application of THE LONG ISLAND RAILROAD COMPANY and THE PENNSYLVANIA TUNNEL AND TERMINAL RAILROAD COMPANY for Approval by the Transit Commission of an Agreement, Dated October 14, 1925, Amending the Agreement Dated July 28, 1925, Between the Pennsylvania Tunnel and Terminal Railroad Company, the Pennsylvania Railroad Company, as Operating Agent for the Tunnel Company, and The Long Island Railroad Company, for Trackage Rights Into and the Use of the Pennsylvania Station, Borough of Manhattan, etc., so as to Provide for a Change in Rental to be Paid by the Long Island Railroad Company, Effective as of January 1, 1926

MEMORANDUM—December, 1925

BY THE COMMISSION:

This is an application by The Long Island Railroad Company and the Pennsylvania Tunnel and Terminal Railroad Company to modify the agreement approved by the Transit Commission on July 21, 1925 (Case No. 2754) for the use by The Long Island Railroad Company of the Pennsylvania Terminal in the City of New York so as to increase the interest rate provided for therein from four and four and one-half per cent to six per cent and as so modified to extend the term of the agreement for one year from January 1, 1926.

The matter of this terminal agreement has been extensively considered by the Commission and has been the subject of two decisions—one on January 23, 1925, in Case No. 2692, and the other on July 21, 1925, in Case No. 2754. It originally came before the Commission on July 13, 1923. The matter has therefore been before the Transit Commission under one or the other of the applications for a period of about two years, during which the whole situation was exhaustively studied. In Case No. 2692, 1784 pages of testimony, together with very voluminous exhibits, were taken; and in Case No. 2754, an additional 369 pages of [fol. 98f-292-2] testimony were taken and 13 exhibits introduced.

In the light of all the testimony thus taken, the Commission, last July, approved the present agreement permitting an increase of about $420,000 a year in the rental, and permitted that increase to be made retroactive so as to be included in the accounts for the years 1923, 1924, and 1925. In these cases the Commission has had to consider an agreement not reached at arm's length between separately owned companies, but between subsidiaries of the Pennsylvania Railroad. In its decision the Commission endeavored to secure a result that would be equitable to all concerned. It was also its expectation, especially in view of making the added rental retroactive, that the approved agreement would continue in force for sometime to come and until conditions, other than those considered by it in Cases No. 2692 and No. 2754, would justify different terms. With only a lapse of about three months, however, the railroad companies propose to enter into a modified agreement that would add several hundred thousand dollars more a year to the rental.

In the opinion in Case No. 2754 it was said in part:

"The final point made by the contestants against the proposed modified agreement is with respect to the interest rate. The agreement negotiated in 1923 and disapproved in Case No. 2692 specified an interest rate of four per cent on the general investment and four and one-half per cent on the power system. In the agreement now under consideration these rates are raised to a flat five per cent.

"Tabulations were introduced in evidence giving information as to what the money actually cost the Pennsylvania Company during the construction period, and Vice President County testified that taking the average and adding certain financial costs the figure would be brought close to five per cent. If this were all there were to the question, a strong case would be made for the five per cent rate, especially as it is fortified by the fact that six per cent is charged under the trackage agreements with the New York, New Haven & Hartford, the Baltimore & Ohio and the Lehigh Valley Railroad Companies and that the same rate is provided for in a proposed similar agreement between the Pennsylvania Company and the Terminal Company. [fol. 98f-292-3] "But I think the five per cent rate should be disapproved and the interest rates specified in the 1923

agreement reinstated for another reason. By incorporating the four and the four and one-half per cent interest rates in the 1923 agreement, the Pennsylvania Company committed itself to what it believed, under all the circumstances, to be fair rates to the Long Island Company. The Transit Commission disapproved the 1923 agreement, not because of the interest rates, but because of other features as indicated in its opinion. Thereupon the companies endeavored to meet the point of the Commission's criticism by withdrawing the great part of the station costs and expenses from the joint account. As a result of the hearing in this case and of a study of the evidence both in this proceeding and in Case 2692, I am prepared to recommend the acceptance of this concession as a fair adjustment. But the action of the companies in raising at the same time the interest rate one per cent on all the rest of the investment, except the power system, and one-half per cent on the power system robs that concession of a great deal of its value. The concession made by the Terminal Company in respect to the investment in the station building is no more than enough to meet the Commission's previous objections and the companies should be held to it to the full instead of suggesting a compromise that might have the appearance of conceding a substantial modification on the one hand while drawing back a good part of it on the other."

No facts are presented on this application that were not before the Commission and considered in extenso on the previous application. In the light of those facts it is the opinion of the Commission that the adjustment indicated in its decision in Case No. 2754 should continue for at least another year.

The application is therefore denied with the statement that the Commission will approve an extension of the present agreement, not otherwise modified, for one year from January 1, 1926.

[fols. 98f-293 & 98f-293-1] TRANSIT COMMISSION, STATE OF NEW YORK

Case No. 2692

In the Matter of the Application of THE LONG ISLAND RAILROAD COMPANY and THE PENNSYLVANIA TUNNEL AND TERMINAL RAILROAD COMPANY for the Approval of an Agreement for Trackage Rights Into and the Use of the Pennsylvania Station in the Borough of Manhattan, City of New York

OPINION

O'RYAN, Commissioner:

This is an application by the Long Island Railroad Company and the Pennsylvania Tunnel and Terminal Railroad Company to amend the existing agreement between them for trackage rights and the use of the Pennsylvania Station, the East River Tunnels, and the railroad yard on Long Island known as the Sunnyside Yard. These facilities are owned by the Pennslyvania Tunnel and Terminal Company, and are used in part by the Long Island Railroad Company.

The existing agreement is dated June 24, 1912. It provides that the Long Island Railroad Company shall pay as rental in each month during the continuance of the agreement a fixed charge of $13,000 (later by supplementary agreements increased to the sum of $25,000), and in addition to such fixed charge, a sum equivalent to such propor-[fol. 98f-293-2] tion of the cost and expense of operation, maintenance, and renewals of the said facilities as the number of its cars and engines used thereon in each month shall bear to the total number of cars and engines used thereon, it being agreed that each engine shall be counted as three cars. In that agreement it was provided that taxes, insurance, lighting of tracks and track crossings, watchmen, and other expenditures imposed by the Federal, State or Municipal authorities, shall be included in maintenance and operation. It was also provided that there should be credited on these expenses the net revenue derived from rentals and concessions at the station.

The agreement also provides that the Pennsylvania Railroad shall furnish the necessary power distributing system

and electric current for the movement of cars, and that the Long Island Railroad Company shall pay a rental therefor in each month upon the basis of car movements above indicated. The basis of computing the cost of the power was stated to be 4½% per annum upon the value of the power distributing system and all its appurtenances and as well upon any additions necessarily made thereto and as well its proportion of the operating expenses of generating and transmitting the current less net revenue from current furnished for other purposes. The following table will indicate the payments that have been made by the Long Island Railroad Company under the provisions of this agreement during the period, 1911-1923:

[fol. 98f-293-3] Transit Commission Case # 2692, Topic # 14, Exhibit # 23

Statement of Amounts Paid by the Long Island Railroad for the Use of the Pennsylvania Terminal, 1911 to 1923

Year	Joint facility operating expenses	Taxes	Rental on power facilities	Fixed rental	Credits acct. station privileges, rentals, etc.	Total	Power	Direct operating charges	Grand total
1911	183,214	.....	.....	300,000	11,567	471,647	26,970	20,556	519,173
1912	203,454	119,516	15,108	228,000	41,590	524,488	48,434	22,428	595,350
1913	223,417	229,122	26,616	156,000	72,241	562,914	52,963	24,118	639,995
1914	214,575	247,806	29,813	156,000	83,789	564,405	63,253	25,821	653,479
1915	266,365	262,922	31,732	156,000	78,141	638,878	26,684	22,875	688,437
1916	305,362	297,588	32,615	156,000	87,443	704,122	27,350	23,735	755,207
1917	375,177	306,675	33,365	156,000	96,377	774,840	50,066	30,370	855,276
1918	549,993	358,699	34,568	156,000	117,899	981,361	60,524	47,810	1,089,695
1919	709,856	354,931	34,015	156,000	137,375	1,117,427	73,171	64,444	1,255,042
1920	886,511	388,889	36,673	198,000	169,969	1,340,104	102,083	67,872	1,510,059
1921	807,370	540,223	41,153	240,000	181,067	1,447,679	103,331	37,533	1,588,543
1922	826,818	570,640	39,598	270,000	254,347	1,452,709	127,483	79,973	1,660,165
1923	930,336	595,305	42,793	300,000	252,987	1,615,447	113,602	82,975	1,812,024

[fol. 98f-293-4] Under the proposed agreement, the basis of determining the rental is modified as follows: In lieu of the fixed amount of $25,000, there is substituted "a sum equivalent to such proportion of 4% per annum on the investment in said railroad, Pennsylvania Station, Sunnyside Yard and facilities and appurtenances as of December 31, 1922, as the number of its cars and engines thereon in each month shall bear to the total number of cars and engines thereon," and for the purpose of fixing the amount of such investment, a table, of which the following is a copy, is inserted in the proposed agreement:

(1) Pennsylvania Station and Yard between Tenth and Sixth Avenues, Borough of Manhattan, New York City	$44,917,721
(2) The approaching tunnels and tracks eastward from Sixth Avenue to Harold Avenue in the Borough of Queens	32,024,953
(3) Sunnyside Yard and adjacent facilities in the Borough of Queens	6,363,517

As will be noted from the table of amounts actually paid by the Long Island Railroad Company already given, the fixed rental paid for the year 1923 amounted to $300,000. Under the proposed agreement, the fixed rental for the year 1923 would approximate $1,327,000. Adding to this base rental the other elements making up the total rental, we find that while the total for the year 1923 under the existing agreement amounted to $1,812,000, the total for 1923, computed under the provisions of the proposed agreement, would amount approximately to $2,839,000, or an increase of approximately $1,027,000.

In a separate proceeding the Long Island Railroad Company applied to the Transit Commission for approval of a new tariff increasing the fares over its lines between stations within the City of New York. The question of the reasonableness of such increase is affected by the determination to be made in this proceeding, and the former proceeding therefore awaits the determination to be made in this proceeding.

A very considerable amount of testimony was taken in this proceeding, and the witnesses were allowed great latitude in giving their testimony. This latitude was extended

[fol. 98f-293-5] to the counsel representing organizations of commuters who will be affected by the determination to be made. It was felt by the Commission that this policy was justified because the protesting public and their representatives would necessarily be handicapped if held to a strict compliance with anything approaching the rules governing a trial in a court of record. Because the facts which the Company believed would support and justify the proposed agreement were contained in records of the Company and because many of these records were technical in their character, the several counsel representing the protesting commuters were at the outset of the hearings rather forced to adduce considerable evidence which the subsequent development of the case indicated to be either irrelevant or hardly material. This circumstance resulted in what otherwise would have been an unnecessarily large record. It is only fair to say that counsel for the Pennsylvania Railroad Company cooperated with opposing counsel and with members of the Commission in the carrying out of this policy, and upon request supplied the Commission and other counsel with copies of records as required, and caused to be made investigations and computations as these were requested.

The stock of the Pennsylvania Tunnel and Terminal Company is owned by the Pennsylvania Railroad Company, which likewise owns a substantial controlling interest in the stock of the Long Island Railroad Company. The three companies are separate corporate entities. The law provides (Section 148 of the Railroad Law) that—

"subject to the permission and approval of the Public Service Commission, any railroad corporation or any corporation owning or operating any railroad or railroad route within this State, may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract."

Under this authority, the Public Service Commission approved the existing agreement of June 24, 1912, which will expire on February 1, 1925.

Viewed technically, it is the function of this Commission [fol. 98f-293-6] either to approve or disapprove the agree-

ment which has been proposed, but it seems to me that in the event of disapproval the Commission should go further and indicate what modification would be likely to meet the views of the Commission. I do not believe that the agreement proposed should be approved because I do not believe it has been justified by the evidence or that it can be justified under all the circumstances. On the other hand, if the Commission were merely to disapprove the agreement, it would leave the companies concerned uninformed concerning the Commission's views of this subject and therefore embarrassed in the drafting of a substitute agreement to meet the situation. I believe, therefore, that the Commission should, if my recommendation for disapproval is to be adopted, indicate the grounds for the action taken so that these may serve as an indication of what the Commission might approve in any subsequent application for approval of a new agreement.

As was pointed out at the hearing, the insertion of the proposed amendment immediately after that clause in the existing agreement, which requires the Long Island Company to make payment in each and every month, would produce a result probably not intended. Nevertheless, it would require the Long Island Company to pay monthly, instead of annually, a sum equivalent to such proportion of 4% per annum of $83,306,191 (i. e. of $3,332,247.64) as the number of its cars moved in each month bears to the total number moved in each month. In approving an agreement, the Commission must have regard for what the contract permits and requires rather than the possible intention of the parties to apply it in some other way. Because the agreement as drawn and submitted for approval requires payments altogether unreasonable, the Commission must withhold its approval and deny this application.

The Commission, however, would fail to satisfy the legitimate expectations of all parties, if it rested its decision solely on the foregoing ground. The arguments made and the evidence presented at the hearings were not confined to the supplementary agreement, but dealt with [fol. 98f-293-7] the equity of the entire arrangement; and I am of the opinion that the time has finally arrived when the theory underlying the original agreement as well as the nature of the amendment to it must be considered. It appears that the original agreement was regarded by the

petitioners as a temporary affair to be replaced by a long term agreement as soon as experience had furnished the more complete and accurate data required to ascertain the just terms. The expectation of the companies that this data would soon be available was not fulfilled, and the term of the agreement was extended from time to time pending the consummation of the plan. The amendments heretofore made affected the arrangement so slightly as to call for no disturbance of its temporary character; but the amendment now proposed affects the principle and the results in so pronounced a manner as to demand an inquiry into the justice of the principles upon which the agreement is based. The temporary arrangement should be superseded by something less tentative and more permanent, and if this is to be done, it is desirable for the Commission to indicate some of the views it has formed as a result of this hearing.

The Pennsylvania Tunnel and Terminal Railroad Company is not an actual operator. Indeed, it is impossible as a practical matter for its property to be operated as an independent railroad. As a practical matter it can be operated only by other railroad companies for use as a terminal of more extended lines. Its revenues, therefore, must be derived solely from rentals paid for the use of its facilities by other railroads which are in a position to operate into it.

The principal operators into the Pennsylvania Station are the Pennsylvania Railroad Company and The Long Island Railroad Company. The station is used to a lesser degree by the New York, New Haven and Hartford, the Lehigh Valley, and the Baltimore and Ohio; but the arrangement with the two latter companies will expire in a few years and very likely will not be continued. All these users pay a rental, with the exception of the Pennsylvania [fol. 98f-293-8] Railroad Company, which operates the property "as agent," that is, uses the property exactly as if it were the owner paying all expenses and taxes and receiving all the revenue, including the rentals paid by other companies. Manifestly, the Tunnel Company cannot be in a position to pay interest or dividends until it collects the revenue itself and receives a rental from the Pennsylvania as well as from the other users.

The making of a long term lease between the Tunnel Company and the Pennsylvania has been in contemplation

since the start, but has not been consummated. It seems desirable that this should be done. Certain additions and improvements in the station ought to be made; but the companies claim that the money for them can no longer be secured from the Pennsylvania, but must be raised by a mortgage on the terminal property, and that the Tunnel Company cannot place such a mortgage until it shows that it will be self-sustaining. Such ability can hardly be demonstrated until the Pennsylvania pays a rental and the Tunnel Company collects its own revenues and keeps an income account, which is not done at present. An increase in the Long Island rental cannot make the Tunnel Company self-sustaining, so long as the rental is collected and retained not by the Tunnel Company but by the Pennsylvania. If it be true that the needed improvements cannot be financed until the Tunnel Company becomes self-sustaining, there is a very practical reason why the long term lease to the Pennsylvania should be entered into.

There is a further reason why the rental payable by the Pennsylvania should be determined. As nearly as I can judge from the testimony of petitioners' witnesses and from petitioners' brief, their theory is that the value to the user of the facilities granted should be the measure of the rental paid for them. Such a theory cannot be applied without qualification. Even on the most extreme theory, the Tunnel Company is entitled at most to a reasonable return on the fair value of its property; but it is conceivable that, if figured on the basis of what the use was actualy worth to the users respectively, [fol. 98f-293-9] the aggregate rental might be vastly in excess of a reasonable return. It would seem that the proper method would be to determine, first, what total rental the Tunnel Company is entitled to receive and, next, the proportion in which this should be distributed among the various users. This would offset the effect of what seems to be the present tendency, namely, to ascertain what the Long Island, the smaller road, should pay, leaving the balance to be paid by the Pennsylvania, for which the facilities were designed. This method employed by the companies, if applied at all, should be reversed; the rental to the Pennsylvania being determined first and the Long Island paying the balance.

Out of the mass of testimony taken and the exhibits presented, it is clear to me that the Pennsylvania Railroad Company in the agreement which is offered for approval has attempted to impose upon the Long Island Railroad Company an unreasonable proportion of the annual cost of maintaining the facilities covered by the lease. It is clear to my mind that the officers of the Pennsylvania Railroad Company, at the time these facilities were authorized for construction, had in mind not only their actual utility for railroad purposes, but as well that they should constitute a monument worthy of one of the best known railroad companies in the country, not to say in the world, and located as they are at the terminal of that railroad in the metropolis of the country. At the time they were constructed, their construction was not made dependent upon any substantial contribution toward the expense by the Long Island Railroad Company. The station building itself could have been planned so as to produce a rental income from sources separate and distinct from the railroad enterprise. That policy was disregarded, as the testimony shows, so that a building of more monumental architectural type might be erected. I have no criticism to make of the adoption of this policy, but it was a policy adopted by the Pennsylvania Railroad Company in furtherance of what evidently was deemed to be in the ultimate best interests of that Company. [fol. 98f-293-10] The financial consequences should not be visited, even in part, upon the Long Island Railroad Company.

It is very difficult, if not impossible, to determine upon any basis of mathematics what percentage of the cost of these terminal facilities should be charged as a monument to the renown of the Pennsylvania Railroad. Some years ago the Pennsylvania Railroad Company tacitly admitted that a portion at least of the cost of its great terminal was an unproductive expenditure and wrote down the securities taken from the Tunnel Company in return for the money invested therein, from the sum of $115,000,000 to $56,000,000, thus writing off $59,000,000. In my opinion a substantial part of the cost of the investment and of the operating expenditures should be charged to the Pennsylvania Railroad and spread over the entire system. In May, 1924, when the subject of the proposed lease was un-

der consideration by the Engineering Department of the Transit Commission, it was recommended by Assistant Division Engineer Alexander that 50% of the cost of the investment in the Pennsylvania Station be charged in this way to the entire Pennsylvania system. After considering the matter carefully, I am of the opinion that the recommendation made is a fair one. The remaining 50% of the cost of the investment should be apportioned among the actual users of the terminal.

Pursuant to the principle indicated and adopting figures submitted by the Pennsylvania Railroad Company, the following table, prepared by Assistant Engineer Henry Heins, jr., of the Transit Commission, will indicate the cost to the Long Island Railroad Company of the Pennsylvania Terminal on the basis of conditions during the year 1922, and for comparative purposes the cost as actually assessed and as determined by the agreement offered for approval:

[fol. 98f-293-11]

Costs to the Long Island Railroad Co. for the Use of the Pennsylvania Terminal, Tunnels & Sunnyside Yard for the Year 1922

	Under proposed agreement	Actual payments	Under suggested principles
Rental	$1,275,000	$270,000	$885,000
Joint Facility Operating Expenses	826,818	826,818	275,200
Taxes	570,640	570,640	355,800
Rental on Power Facilities	39,598	39,598	39,600
Credits a/ct. Station Privileges	Cr. (254,347)	Cr. (254,347)	Cr.(26,700)
Sub total	$2,457,709	$1,452,709	$1,528,900
Power	$137,483	$127,483	$127,500
Direct Operating Charges	79,973	79,973	80,000
Total	$2,665,165	$1,660,165	$1,736,400

In relation to the first item of rental, being the fixed rental, the amount, $885,000, was arrived at by spreading 50% of the cost of the Pennsylvania Station and Yard over the Pennsylvania system and assessing upon the Long Island Railroad Company interest figured at 4% on its share of the remainder. This share is determined by estimating the area of the station used, in combination with the investment in the station and the car movements of the Long Island Railroad Company in their relation to the total car movements, in combination with the investment in the Pennsylvania Station Yard, the East River Tunnel and the Sunnyside Yard. In relation to the use of the Pennsyl-

vania Station, 40% of the interest charge on $898,354 is charged to the station building and 60% to the Pennsylvania Yard. Extensive surveys and calculations were made to indicate the exact amount of station space used by the Long Island Railroad Company. For a number of reasons, it is impossible to determine the extent of this use with mathematical precision. It is believed to be a fair assumption that the Long Island Railroad Company uses about 7% of the station. In relation to the Pennsylvania Yard, I believe a fair estimate of its use by the Long Island Railroad Company is approximately 33%. The total expense of the maintenance of the facilities was determined by taking the Long Island Railroad Company's payment for 1922, namely $826,800, and distributing the same over the facilities on the basis of 1923 details of these expenses. This payment of the Long Island Railroad Company constituted its share of the total expense, based on the car movement or wheelage basis. The expense having been distributed [fol. 98f-293-12] between station and yard, on the basis of 80% to the station and 20% to the yard, the application of the principle used in determining the fixed rental in connection with extent of use of the Station Building, and the car movement or wheelage basis for the Pennsylvania Yard, East River Tunnels and Sunnyside Yard results in a total joint facility operating expense to the Long Island Railroad Company of $275,200. It was found that an important element in the total cost of station maintenance is the number of employees, nine hundred and eighty-three (983), whose annual salaries aggregate $1,247,221. It would appear that but 3½% of this cost is fairly chargeable to the Long Island Railroad Company. The foregoing will account for the substantial difference between the amount charged by the Pennsylvania Railroad Company under this head ($826,818) and the amount above suggested as equitable.

In relation to taxes, the figure, $355,800, is arrived at in the following manner: The total taxes for the Pennsylvania Tunnel and Terminal Company's property for 1922 were estimated by taking the total payment for that year, made by the Long Island Railroad Company, namely, $570,640, and distributing it over the various facilities on the basis of the 1923 details of taxes, this payment being a share of the total on the car movement or wheelage basis. The total taxes distributed were sub-divided by assuming that

50% of the station and yard taxes were chargeable to the station and 50% to the yard. The amount of total taxes thus arrived at, application of the principle used in apportioning the rental and the joint operating expenses, gives the Long Island Railroad Company share of the taxes as $355,800.

In relation to credits on account of station privilege, the amount mentioned in column 1 of the above table, namely $354,347, is presumably a third of the total revenues from this source, but on the basis of station area used by the Long Island Railroad Company (7% of 50% total), the credit for station privileges to be allowed the Long Island Railroad Company should be reduced as shown in column 3, to $26,700.

The foregoing will indicate what I believe to be fair and [fol. 98f-293-13] reasonable principles and computations for determining the character of lease which should have the approval of this Commission.

Certain objectionable features appear in the existing agreement of 1912, and these should be indicated for the information of the Railroad Company in preparing for submission to the Commission any new agreement.

There should be eliminated from any new agreement submitted the provision which now appears in Sub-Division B of Paragraph 4th of the existing agreement, to the effect that the method of computing the proportion of operating expense and taxes to be paid by the Long Island Railroad Company, therein specified, may be abandoned and any other more convenient basis of division adopted which may be agreed upon between the representatives of the two companies. Obviously a method which has been agreed upon and approved by the Public Service Commission or its successor should not be subject to modification by later agreement between the companies without further approval of the Transit Commission.

Paragraph 5th of the existing agreement contains a similar provision which should not be repeated in objectionable form in any new agreement offered.

In paragraph 3 of the existing agreement, it is provided that the agreement shall continue indefinitely after the prescribed period agreed upon, unless terminated by six months' prior notice in writing by either company to the other. This proviso is objectionable and should not be

repeated in any new agreement offered. The approval of the Public Service body of an agreement of this character is for a definite term, and the term should not be extended by agreement between the parties except with the renewed approval of the Transit Commission.

Accordingly, I recommend that the proposed lease and rental agreement be disapproved.

John F. O'Ryan, Commissioner

Dated December 24, 1924.

[fol. 98g-1] Interstate Commerce Commission

Finance Docket No. 7308

Use of Pennsylvania Terminal in New York City by Long Island Railroad

Submitted —— —, ——. Decided —— —, ——

Recommended:

1. That the commission find that the present and future public convenience and necessity require the operation by the Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue, in Sunnyside Yard, and the Pennsylvania Station, New York, N. Y. including the partial use of said yard, station, and appurtenant facilities; but that the terms of the agreement, dated November 13, 1928, between the Pennsylvania Railroad Company, lessee of the Pennsylvania Tunnel & Terminal Railroad, and the Long Island Railroad Company are inequitable;

2. That the issue of a certificate of public convenience and necessity be deferred until an agreement shall have been submitted to the commission, the terms of which are found to be fair and reasonable; and

3. That the application for an order requiring the use of said facilities by the Long Island Railroad on the terms agreed upon be dismissed.

Alfred A. Gardner, D. P. Williams, and Joseph F. Keany for applicants.

Arthur J. W. Hilly by Vincent Victory, M. Maldwin Fertig, and Harry Hertzoff for city of New York; George H. Stover and Edward M. Deegan for Transit Commission of the State of New York, Maurice Hotchner for Association of Long Island Commuters, Incorporated, interveners.

REPORT PROPOSED BY M. S. JAMESON, EXAMINER

On December 13, 1928, the Pennsylvania Railroad Company, lessee of the Pennsylvania Tunnel & Terminal Railroad, and the Long Island Railroad Company, carriers by railroad subject to the interstate commerce act, filed a joint application under section 1 (18) of the act for a certificate that the present and future public convenience and necessity require the operation by the latter, under trackage rights, over that portion of the lessor company's railroad between Harold Avenue, in Sunnyside Yard, borough of Queens, and [fol. 98g-2] the Pennsylvania Station, borough of Manhattan, New York, N. Y., a distance of 4.2 miles, including the use of said yard and station, and the facilities and appurtenances thereof, and for an order under section 3 (4) of the act requiring the use of said tracks and facilities by the Long Island Railroad Company on the terms and for the compensation agreed upon by the Pennsylvania Railroad Company and the Long Island Railroad Company. On May 21, 1929, an amended application was filed, in which the amounts of investment for the several major divisions of the jointly used facilities were revised. A proposed joint agreement dated November 13, 1928, effective July 1, 1928 was appended. The interveners all oppose the granting of the application. A hearing was held and briefs were filed.

For convenience, reference will be made in this report to the Pennsylvania Railroad Company as the Pennsylvania, to the Pennsylvania Tunnel & Terminal Railroad Company as the Terminal Company, to the Long Island Railroad Company as the Long Island, to the city of New York as the City, to the State of New York as the State, to the Transit Commission of the State of New York as the Transit Commission, to the Association of Long Island Commuters, Incorporated, as the Commuters, to the Lehigh Valley Railroad Company as the Lehigh Valley, and to the New York, New Haven & Hartford Railroad Company as the New Haven.

All of the capital stock of the Terminal Company, and practically all of the capital stock of the Long Island, are owned by the Pennsylvania, which operates the property of the former under a long-term lease pursuant to authority granted by the commission on August 4, 1928, 145 I. C. C. 283, but does not operate the property of the latter. Broadly considered, all the lines and facilities involved in this application are those of the Pennsylvania. But the rental to be charged to the Long Island is not an intercom- [fol. 98g-3] pany affair when the public is materially affected as a result of the amount paid, and it is this consideration which forms the basis of the interveners' protest. According to the contention stoutly advanced, the increase which is now proposed over the present rental will, by reason of its effect on the earnings of the Long Island, be used as a basis for an attempt to raise the commutation fares on that road by application to the Transit Commission. The interveners claim that the terms of the agreement presented with the application would impose an unfair burden upon the Long Island, and they further represent that the commission is without jurisdiction in the premises but that the Transit Commission has in the past exercised its authority as granted by the State and should continue to do so.

It is true that the joint agreement under which the Long Island has been using these facilities since July 1, 1923, is one which was framed to meet the requirements of the Transit Commission, as expressed and made retroactive by their approval of the contract of July 28, 1925, after extended hearings and investigation. Prior agreements were also approved by the Transit Commission or its predecessor. It is true that the amount of rental which the Long Island pays to its parent company is a matter that primarily concerns intrastate passenger traffic, indeed hardly more than traffic within the suburban zone of the city, and that the public interest affected might appear to be entirely local. These facts do not however, place the granting of authority covering these trackage rights beyond the purview of section 1(18). The applicants are engaged in interstate commerce, and the commission has, at least since 1925, exercised authority over extensions of the lines of such carriers under trackage agreements. The existing agreement of the Pennsylvania and the Long Island was on a yearly basis.

[fol. 98g-4] It technically expired on December 31, 1925, and was extended for one year. The desire now being to establish a more permanent arrangement, the proposed agreement is for a term of 20 years beginning July 1, 1928. The granting of authority for the applicants' proposal under section 1(18) is both necessary and appropriate, and there is no sound reason preventing the assumption of jurisdiction by the commission under this part of the act, even though joint operation began prior to the effective date of the Transportation Act, 1920, and has been continuous. As to section 3(4), which provides for the compulsory use of one carrier's terminal facilities by another carrier when the public interest requires such use, there is nothing in the situation here presented which brings it within the terms of that paragraph. By voluntary arrangements between the parties the Long Island has been using the tunnel, yard, and terminal facilities provided for it by the Pennsylvania in New York since September 8, 1910. There is no suggestion that the Pennsylvania intends to discontinue this privilege. The question of compensation is indeed at issue, but, contrary to the applicants' understanding of the force of this fact, associated as it is with the close corporate relationship between the companies, the applicability of section 3(4) does not appear. Accordingly, the fixing of compensation as therein provided on the principle controlling compensation in condemnation proceedings, may be disregarded. That part of the application which is under section 3(4) should be dismissed. The reasonableness of a joint facility rental is in general a matter of public interest, as well as a matter which may affect the operations of the carriers in interstate commerce, and should be considered by the commission in reaching a finding of public convenience and necessity. Thus, the financial as well as the transportation features of the present application may be fully recognized and dealt with under the authority conferred by section 1(18). In cases of ex-[fol. 98g-5] tensions of lines under trackage rights the cost to the applicant companies is not less important than in cases of extension by construction, acquisition, or lease. A motion to dismiss the application on the ground of lack of jurisdiction was properly denied.

The case is brought to issue mainly because of the matter of increased fares on the Long Island, but consideration of

the questions of rental, degree of use, and the like which are now presented to the commission should be studied strictly on the showing of fairness and reasonableness and should not be influenced by the contingency emphasized by the protestants. Fairness to the Pennsylvania in the matter of rental is as desirable as fairness to the Long Island. It may be mentioned that no attempt has been made to ascertain the exact effect of the recommendations hereinafter made on the total payment by the Long Island. It should be further stated that those provisions in the applicants' contract which were not discussed in the record, such as the liability clauses, are not treated in this report.

The Pennsylvania completed in 1910 its huge project of establishing a passenger terminal in New York. As shown by the record, provision was made for the accommodation of the Long Island's passenger traffic into and out of the city by constructing two single-track tunnels under the East River, tracks and platforms in the terminal, and other facilities for the Long Island's use. That carrier's operation into the terminal has been continuous for 19 years, during which period the number of passengers handled annually has more than trebled and the earnings of the company have risen from a deficit of $510,221 in 1920 to a net income of $4,682,656 in 1928. Instead of the former ferry connection on the East River between Long Island City, in the borough of Queens, and the foot of Thirty-fourth [fol. 98g-6] Street, in the borough of Manhattan, the Long Island has enjoyed the great advantage of a direct rail connection with Pennsylvania trains, city subways, etc., at the Pennsylvania terminal. The service to the public and the benefit to the carriers by the operating arrangement between these companies are well established and are entirely uncontroverted. The need for continued operation by the Long Island in this manner may be safely assumed to have been demonstrated.

The Terminal Company's property represents that of two predecessor companies, the Pennsylvania, New York & New Jersey Railroad Company and the Pennsylvania, New York & Long Island Railroad Company, whose ownership embraced, respectively, the new facilities in the States of New Jersey and New York. There were constructed two single-track tunnels under the Hudson River, a yard and passenger station in the borough of Manhattan, four

single-track tunnels extending easterly beneath the city and the East River, and the Sunnyside Yard, in the borough of Queens, on Long Island. Provision was made for electric operation. The total expenditure approximated $115,000,000, which was covered in part by $25,000,000 of Terminal Company stock and a certificate of indebtedness of $84,861,000 issued to the Pennsylvania. The certificate was placed on the Pennsylvania's books at $57,461,000; the Terminal Company's stock was "marked down," and the total amount finally written off was about $59,000,000. The average cost of money during the construction period, 1905-1910, was about 5 per cent.

Besides the Pennsylvania and the Long Island, the terminals and tunnels are used by the Lehigh Valley and New Haven. In the studies of traffic, etc., the cars of these lines have been combined with those of the Pennsylvania, and they may be considered as having no material bearing in a determination of the questions involved except where specifically mentioned. The fundamentals of the case con- [fol. 98g-7] sist of fixing the physical limits of property jointly used and exclusively used by the Long Island and the Pennsylvania, together with the respective values thereof and the annual rate of interest to be applied thereon, and of fixing a suitable measure of the relative use of the facilities within each physical division of the property.

Omitting the Terminal Company's line which is used solely by the Pennsylvania, namely the portion situated west of Tenth Avenue, borough of Manhattan, the facilities affected by the Long Island's operation are described as follows:

Zone 1

Bounded approximately by Sixth Avenue, Thirty-first Street, Tenth Avenue, and Thirty-third Street. Contain a track layout at a level about 47 feet below the street, with 21 tracks at platforms, the area being enclosed by retaining walls. The station building occupies the block between Seventh Avenue, Thirty-first Street, Eighth Avenue, and Thirty-third Street. The Long Island waiting room, concourse, etc., are located on the level immediately above the tracks. Above this are five other floor levels, arranged as Pennsylvania facilities. Long Island trains do not proceed west of Tenth Avenue.

Investment stated for zone 1, as of July 1, 1928, $46,896,-746.94.

Zone 2

Embraces four single-track tunnels extending easterly from zone 1 under East River, together with tracks running to Harold Avenue, borough of Queens, where connection is made with the Long Island's lines. Two of the tunnels are exclusively used, and two partly used, by the Long Island.

Investment stated for zone 2, as of July 1, 1928, $32,605,-521.38.

[fol. 98g-8] Zone 3

Embraces Sunnyside Yard and adjacent facilities near Harold Avenue. These facilities are primarily for the storage and handling of Pennsylvania cars. Several tracks are used, however, by the Long Island for storing such trains as are hauled by electric locomotives into the station in zone 1.

Investment stated for zone 3, as of July 1, 1928, $8,623,-170.90.

If the foregoing amounts of investment be added to the cost of the Pennsylvania tunnels west of Tenth Avenue, as shown by an exhibit of record, the grand total is $106,-744,446. The final value of the Terminal Company owned property as of June 30, 1918, found by the commission for rate making purposes but not introduced as evidence in this proceeding, is $120,885,852. The basic amounts set up by the applicants in the proposed agreement were not contested per se, the main point raised in this connection being whether or not the station building should be excluded because not being required for the Long Island's use. The basic amounts represent original cost.

For the electric power plant in Long Island City and the distribution system, no amount is included in the foregoing investment for the three zones. It is provided in the proposed contract that a value be agreed upon for these facilities by the parties. In the 1925 agreement a value of $9,189,677 was used. As the central plant furnishes power for the operation of Long Island trains outside of the terminal area, as well as for trains of the Hudson & Manhattan Railroad between Newark and Jersey City, N. J., a comparatively small part of its output is used by trains of the

Pennsylvania and Long Island moving over the Terminal Company's tracks. This is the reason given for the omission of a specific sum in the agreement. It is not clear why the applicants can not arrive at an understanding as to value at this time.

[fol. 98g-9] Since September 1, 1910, five successive operating agreements between the carriers have been in force. In each instance there was voluntary submission to the State commission, because the law of the State provided that a carrier could not use the tracks of another carrier without the approval of that body. Under the terms of all these contracts, operating expenses were apportioned between the Pennsylvania and the Long Island on a wheelage basis, which is the ratio of the car movements of each carrier to the total car movements, in each zone. Except in the first agreement, taxes were divided on that basis. The Long Island paid fixed rentals or interest on the investment in amounts varying from $156,000 to $300,000 per annum. In June, 1923, the carriers applied to the Transit Commission for approval of a new contract under the terms of which the Long Island would have paid a total of $2,665,-165 for rental, operating expenses, taxes, and use of power in 1922, as compared with a total of $1,660,165 actually paid under the existing agreement. Concurrently the Long Island applied for authority to increase fares on its suburban lines within the city. In the trackage rights case, known as No. 2692 and hereinafter so called, the Transit Commission held hearings during approximately two months, and then entered an order denying the application and disapproving the agreement. An investment of $83,-306,191 was set up in the new agreement for the property in zones 1, 2, and 3, and the Long Island was to pay annually a sum corresponding to such portion of 4 per cent on this investment as the number of its car movements bore to the total number of car movements. Under this principle there would have been an increase of about $1,000,000 in the rental payment alone. This was considered unfair to the Long Island because of the alleged relatively small need of that carrier for the elaborate terminal erected by the Pennsylvania. Exception was taken to the distribution of [fol. 98g-10] operating expenses on a wheelage basis, notably with respect to the large item of station employees. The agreement provided for interest on the power plant

and distribution system on the basis of 4.5 per cent, which was the same rate as applied in the earlier contracts.

In March, 1925, the carriers submitted to the Transit Commission the modified agreement under which operation is now carried on. After hearing in a case known as No. 2754, the Transit Commission approved this agreement and permitted it to become retroactive to July 1, 1923. In order to meet the Transit Commission's previous objection, the applicants eliminated from the investment in zone 1 the sum of $15,000,000 as representing the station building above track level, and from operating expenses the corresponding expenses and taxes. The interest rate, however, was proposed to be raised from 4 to 5 per cent. In net effect there would have been a reduction of about $353,000 from the annual payment of the Long Island as compared with the plan which had been disapproved in case No. 2692. In the deciding opinion in the proceeding it was concluded that the wheelage basis of apportionment was probably the most practical and common-sense method that could be used. It was decided that no change in the $15,000,000 adjustment was required because of such costs as real estate and excavation in zone 1, which the interveners contend should not all be left in the investment that is used in the proposed contract. The opinion held that the charging off by the Pennsylvania of about one-half the investment in the terminal property did not affect the merits of the rental question. The proposed change in interest rate to 5 per cent was disapproved and the parties required to maintain the same rates that were incorporated in the contract last submitted to the Transit Commission, viz., 4 per cent on the adjusted investment in zones 1, 2, and 3, and 4.5 per cent [fol. 98g-11] on the electric distribution and power system. The more important provisions of the approved agreement of July 28, 1925, follow: The wheelage ratio, in which one locomotive is counted as three cars, is applied to the interest at 4 per cent on a total value of $70,392,230 for the jointly-used facilities in zones 1, 2, and 3, from which the station facilities above track level are excluded. The wheelage ratio is also applied to all operating expenses, maintenance, and taxes at track level. Interest is accrued on the cost of future additions and betterments to the property at 6 per cent. On the agreed value of $9,189,677 for the electric power and distribution system as of De-

cember 31, 1924, interest at 4.5 per cent is applied. The sum decided upon for the station building was composed principally of $14,092,499 for the structure proper, and $860,000 for one-half of a service plant on Thirty-first Street which is used to supply light, heat, and power to the station.

The plans of the carriers in all these cases were actively opposed by the City, the Commuters, and others. After joint hearing before the Transit Commission and the Public Service Commission of the State of New York, the Long Island's application for authority to increase its suburban fares was denied. As has been stated, the Transit Commission joins with the City and the Commuters in opposition to the granting of the application pending before the commission.

A statement of the total costs attached to the facilities under discussion, including the station, before any allocation between the carriers is made, for the year 1928 is given below:

	Zone 1	Zone 2	Zone 3	Totals
Valuation	$46,896,747	$32,605,521	$8,623,171	$88,125,439
Interest at 6 per cent	2,813,805	1,956,331	517,390	5,287,526
Taxes	903,101	494,218	94,011	1,491,330
Operating expenses	2,735,386	243,804	513,052	3,492,242
	6,452,292	2,694,353	1,124,453	10,271,098
Credit from concessions	1,040,929	21,964	63,393	1,126,286
Net totals	5,411,363	2,672,389	1,061,060	9,144,812

[fol. 98g-12] With the use varying according to the wheelage ratio in each zone, the Long Island paid to the Pennsylvania the following total amounts in 1928, under the terms of the existing contract:

Operating expenses	$459,902
Interest on investment	1,361,842
Taxes	550,398
Total	2,372,142
Cost of electric power and interest on power facilities	324,416
Direct operating charges	138,623
Grand total	$2,835,181

As compared with the sum of $2,372,142, covering facilities other than electric power, the Long Island would pay under the agreement now proposed:

Interest at 6 per cent	$2,400,921
Taxes	681,384
Operating expenses	1,339,194
	4,421,499
Proportion of credit from station concessions	451,880
	$3,969,619

Under the proposed arrangement, the station building is reinstated in the investment. The items of operating and maintenance expenses previously withdrawn as pertaining to the station above track level also have been included. The interest rate has been increased from 4 per cent to 6 per cent on present value, or investment. Allowance is made for the first time for rentals received by the Pennsylvania from offices, stores, and other concessions in the station. As under the existing contract, the aggregate of interest, taxes, and operating expenses in each zone is to be the base to which the wheelage measure in that zone is applied. For 1928, the wheelage ratios for the Long Island were: Zone 1, 41.44 per cent; zone 2, 59.94 per cent; zone 3, 11.60 per cent. It was stated that there would be an increase of approximately $20,000 in the annual charge for power, which is apparently due to the change in interest [fol. 98g-13] on the investment from 4.5 per cent to 6 per cent. There would be no change in the direct operating charges. The agreement contains provision for revision at the end of five-year periods with respect to the rates of interest and the bases upon which they are computed.

It is made plain that no increased benefits are to be enjoyed by Long Island passengers by reason of the proposed contract, as the facilities used by them will be the same as at present. The applicants contend, however, that the proposed agreement is fair and equitable, that the wheelage method of apportionment is the fairest and most practical method of determining compensation for use of a joint facility, that the station building should be included since it is largely and increasingly used by Long Island passen-

gers, and that the tracks and platforms in zone 1, taken as a whole, are used to practically the same extent by both roads.

Reflecting the growth of passenger business on the Long Island and the lack of such growth on the Pennsylvania, attention is called to the fact that nearly 50,000,000 Long Island passengers passed through the terminal in 1928, while the Pennsylvania had only 10,000,000. An engineer testifying for the applicants claimed that the value of the use to the Long Island can not practicably be determined, but that the plan attempts to measure the relative use actually made of the facilities. In defense of the 6 per cent interest rate, it is argued that that rate is practically the legal one in New York and Pennsylvania and is the rate prescribed in the Transportation Act for loans from the fund created by recapture.

To all the main features of the proposed agreement and to the applicants' contentions in support of them, the interveners emphatically object, particularly as regards zone 1. [fol. 98g-14] The position of the City and the Commuters was developed in great detail in the Transit Commission hearings hereinbefore mentioned, and it is evidently intended that this commission should recognize the facts and considerations which were matters of evidence in the Transit Commission cases. To the extent that such evidence is included in the present record this may be done. In the statement of facts following it will be understood that the Pennsylvania's operation includes equipment of the Lehigh Valley and the New Haven.

The multiple-unit electric trains of the Long Island move over main lines and at least 10 different branches on Long Island to the Flatbush Avenue Terminal in the borough of Brooklyn and the Pennsylvania Terminal in the borough of Manhattan. Because of the numerous suburban routes, scheduled service rather than headway service is required. In connection with the Pennsylvania Terminal, tunnels Nos. 3 and 4 in zone 2 are assigned to the Long Island, and tunnels Nos. 1 and 2 to the Pennsylvania, but in the hours of heavy traffic it is necessary for the Long Island to use all the tunnels. At the Manhattan terminal about 75 per cent of the Long Island trains are stored during the day on yards B and C, and to some extent in yards A, D, and E, all these yards being located at the west end

of the track area. Certain trains, however, are sent back from the platforms at which they arrive, and a few others, which are hauled by electric locomotives, are taken, to Sunnyside Yard for storage, cleaning, etc. In the terminal plan the Long Island was originally assigned four platform tracks, viz., Nos. 18, 19, 20, and 21, and partial use of three others, viz., Nos. 15, 16, and 17. According to the applicants' witnesses, the Long Island now uses four tracks exclusively and 11 tracks jointly with the Pennsylvania. On joint tracks Nos. 5, 6, 8, and 9, some 16 Long Island trains [fol. 98g-15] carrying 13,000 passengers are brought in during the morning rush hour. In addition to its regular traffic, the Long Island also runs from 4 to 10 trains daily in the racing season between May and October, using tracks Nos. 15 and 16. Passengers for these trains depart from the Pennsylvania concourse on the level next above the Long Island concourse and do not use the Long Island waiting room. The Pennsylvania has practically no suburban business at this station, such traffic being handled at the down-town terminal of the Hudson & Manhattan Railroad. At the maximum the Long Island brings in 36 trains per hour, unloads a train in four minutes, and starts a train out from each platform every 10 or 12 minutes. Pennsylvania trains generally remain 20 minutes at the platforms, except in the case of Pullman sleeping cars which are brought into the terminals at about 10 P. M. and stand ready for occupancy until they depart between 11 P. M. and 2 A. M. If the total traffic in the whole period of 24 hours be considered, the Long Island has an average of 76 trains per track on five tracks for an average time of 14 minutes each, and 11 trains on 9 tracks for an average time of 21 minutes each. As compared with this the Pennsylvania has 13 trains per track on seven tracks and 16 trains on nine tracks for an average time of 61 minutes each. The Long Island has an extremely heavy peak traffic which far exceeds the density on the Pennsylvania. In the rush period the Long Island hourly sends 25 trains through its tunnel and 11 trains through the Pennsylvania tunnel in zone 2. The Pennsylvania has operated 15 trains per hour but the usual number is about five. It is clear that the principal operation of the Long Island in the terminal is of a different character from that of the Pennsylvania.

A count made during a 24-hour period in March, 1929 shows the relative use of station tracks in zone 1 to be as follows:

[fol. 98g-16]

	Long Island	Pennsylvania
Number of trains, eastbound	243	120
Number of trains, westbound	238	113
Number of trains, total	481	233
Number of cars eastbound and westbound, counting one locomotive as three cars	3,860	2,772
Switching movements	193	540
Total time occupied	126 hrs., 22 mins.	236 hrs., 13 mins.

For the year 1928 the total number of car movements in the three zones were as shown below:

	Long Island		Pennsylvania	
	Number	Per cent	Number	Per cent
Zone 1	1,370,677	41.44	1,936,754	58.56
Zone 2	1,370,677	59.94	915,947	40.06
Zone 3	110,874	11.6	844,715	88.4

It is pointed out that, in general, the Pennsylvania trains make four movements at the terminal by reason of storing cars at the Sunnyside Yard in zone 3, while the Long Island trains make but two movements, their cars being stored in the terminal, zone 1. Later in this report the method of counting cars will be discussed.

Another 24-hour count shows the average number of cars stored in the yards at the station as follows:

	Long Island cars	Pennsylvania cars
Yard B	17.8	0
Yard C	39.8	0
Yards A, D, and E	26.3	37.1

[fol. 98g-17] The applicant compiled and introduced a statement of the length of tracks and platforms occupied by the trains of each carrier at the station, and the respective time of their occupation, from which it was deduced that the total track area of 1,214,449 square feet should be apportioned in the ratio of 49.34 per cent to the Long Island and 50.66 per cent to the Pennsylvania. It was shown that 48,540,920 Long Island passengers arrived at and departed from the terminal in 1928, as compared with 10,597,115 Pennsylvania passengers. The time is thought

to be approaching when a greater number of persons can not be handled by the Long Island at this station, and there is under consideration a new and additional terminal at Diagonal Street in Long Island City. It is believed that the limit of capacity has been reached at one hour of the morning and one hour of the evening, and that the only way in which more passengers could be carried would be by adding two cars to each train of 10 cars.

In connection with the evidence pertaining to the track facilities in zone 1 and their use, it may be stated that the Commuters introduced testimony by an expert witness, and contend in their brief, that the Long Island requires but six station tracks and therefore that it should be charged with only six twenty-firsts of the investment and expenses at track level. This intervener considers that the Long Island uses virtually five tracks exclusively and nine other tracks jointly, and that the aggregate number of trains on the latter is such that one additional exclusive track would be sufficient to meet the road's needs had the general layout been designed with due regard to the Long Island's operation. It is further claimed that the Long Island's use of the joint tracks does not interfere with the comparatively small requirements which the Pennsylvania has for them. Concerning these suggestions the applicants' engineer explained that no rigid division of track space [fol. 98g-18] would be desirable since efficient operation requires that the tracks be used according to the varying demands of the two carriers at different times during the day and night. As having some bearing on the division of space, a study presented by the City in case No. 2692 indicated that the trackage originally assigned to the Long Island at the station corresponded to 12.72 per cent of the total volume of space at that level.

With respect to the station facilities above track level, the existing contract represents the insistence of the Transit Commission on the deletion of their cost from the investment because of the consideration that this large station is not needed for commutation traffic. It also represents the Transit Commission's desire to have the old 4 per cent interest rate retained. These concessions by the carriers were generally looked upon as mitigating the alleged injustice of the wheelage ratio. Under such circumstances it is not surprising that a proposal to include the entire in-

vestment and to raise the interest rate, while retaining the wheelage provision as before, should bring forth a strong protest. As already stated, all ticket offices, waiting rooms, and other station facilities assigned to the Long Island are located on the —— exit-concourse level immediately above the tracks and reached therefrom by stairways. The westerly part of the general concourse space on this level is used by incoming passengers of the Pennsylvania. The three areas on this level devoted to the Long Island for various purposes were estimated respectively at 100 by 100 feet, 150 by 200 feet, and 50 by 150 feet. As the floor areas in the entire building were not calculated by the witness who testified as to these figures they can not be consistently utilized in computing an apportionment of the total station space. In case No. 2692 the City introduced [fol. 98g-19] a computation which purported to show that the Long Island occupied only 1.559 per cent of the total cubic feet in the structure. The Long Island waiting room has been reduced in size and the concourse enlarged, but this is not understood to affect the aggregate area occupied, which is said to be larger than that originally assigned. The Long Island's waiting room facilities are smaller and less elaborate than those on the station levels above them, but the applicants contend that the commuters, constituting from 70 to 75 per cent of all Long Island passengers, require only the relatively small waiting room space that has been provided. However, it seems that those persons who are obliged to wait a considerable length of time make use of the Pennsylvania's main waiting room because of the crowded conditions below. Passengers going to the race trains do not occupy the Long Island waiting room at all, and it was testified that Long Island passengers in general use the Pennsylvania part of the building extensively. With the approaching opening of a new subway on Eighth Avenue and the connection of its station with the Pennsylvania Terminal, Long Island passengers will make a still greater use of the building in passing between their trains and that subway station. As to the spaciousness and elaborateness of the terminal, the applicants argue that these features are and have been as much an advertisement for the Long Island as for the Pennsylvania, and that the increase in business and earnings of the former carrier is largely due to these circumstances.

While the Long Island has no rail competition in its territory, it competes with roads which serve other suburban residential districts and thus may be fairly considered to derive a general benefit from the attractiveness of its city terminal. From a purely utilitarian point of view it may be conceded that the frequent suburban service of the Long Island, almost but not entirely equivalent to the headway operation performed by the Hudson & Manhattan, does not [fol. 98g-20] need a monumental type of terminal building. At the same time, the fact is that a steady and substantial increase has taken place in the Long Island's traffic without much change in that of the Pennsylvania. If between 70 and 75 per cent of the Long Island's passengers are regular commuters, the others somewhat outnumber the total of all Pennsylvania passengers which use the station. Built primarily for the Pennsylvania, with some 12,000 miles of line within its system, the terminal seems to have become far more of a facility for the Long Island, with 400 miles of line, than was originally contemplated.

The Commuters stress the fact that the $15,000,000 value placed upon the station above track level reflects nothing for the cost of excavation, land, and other items, and they say that the amount should probably have been over $25,000,000. In a statement showing a separation of the costs in zones 1, 2, and 3, as of December 31, 1923, the charges under buildings include $14,092,499.11 to Station-Manhattan, and $1,713,041.67 to Service Plant-Manhattan. The same statement shows for zone 1: Real Estate, $11,484,551.16, easements, $1,800,796.25, taxes, $1,429,316.37 and grading, $7,201,008.24. No separate item for retaining walls is found and, according to the testimony for the applicants, no part of that cost was included in the $15,000,000, but is included, together with all the land, excavation, etc., under the existing agreement in the investment for zone 1 upon which the Long Island pays its proportion of interest. The theory by which this is done must assume that the costs described would have been incurred in any case by the construction of the track layout itself. The station structure occupies approximately one-fourth of the total length, east and west, of zone 1. Evidently the Transit Commission did not withhold its approval of the $15,000,000 adjustment because no part of these other costs were [fol. 98g-21] incorporated therein.

In case No. 2692, the Commuters made a showing of the Long Island's terminal costs in zone 1 as compared with the terminal costs of the Hudson & Manhattan in New York, and the City presented an engineering report in which a hypothetical terminal at Thirty-third Street and Fourth Avenue, Manhattan, together with two tunnels extending to Long Island, were projected and estimated. The cost of the station building in the latter study was shown as $3,549,000, and that of the whole project as $20,296,275. These showings have something more than an academic interest, yet it is existing conditions which must be dealt with, even though those conditions are not all definitely determinable. In the opinion in case No. 2692, it was said that "it is very difficult, if not impossible, to determine upon any basis of mathematics, what percentage of the cost of these terminal facilities should be charged as a monument to the renown of the Pennsylvania Railroad."

As the interest on value, operating expenses, and taxes are all to be apportioned under the proposed agreement on the wheelage or car movement basis, this provision is an important consideration. No change has been made or is intended to be made in the method of counting cars which has been followed since 1910. A separate count is made in each zone, and the applicants claim that the result is very much in favor of the Long Island. The cars of multiple-unit trains do not have to be switched to the same extent that those of steam trains do, nor is the same amount of cleaning and reconditioning required. There are consequently not so many movements of empty cars by the Long Island as by the Pennsylvania. Since revenue trains of the Long Island do not pass through Sunnyside Yard, it will be sufficient to describe the operation in zones 1 and 2. The cars of each road are counted once as they enter zone 1, once as they leave it, and once as they pass through [fol. 98g-22] zone 2. A Long Island train coming in westbound, stopping or laying over at the station, and returning eastbound is counted a total of four times in these two zones. A Pennsylvania train coming in eastbound, stopping at the station, passing through the tunnel in zone 2 towards Sunnyside Yard for storage, and later repeating the movement westbound, is counted a total of six times, which includes the non-revenue movements in zone 2. In but 5 cases in 100, where a Pennsylvania train returns to the west

from the station without going to Sunnyside Yard are Pennsylvania cars counted only twice. A slight inequity to the Long Island may be found in the fact that not all of the Long Island cars traverse the entire length of zone 1. To the objection that Pennsylvania cars are of greater weight than Long Island cars, it is stated that the latter are accelerated faster, requiring a greater proportion of power in a short run, that the steam used for heating the Pennsylvania cars is charged directly to that company, and that an average Long Island car brings in two or three times as many passengers as a Pennsylvania car. For these and other reasons it is not considered necessary to apply a factor of adjustment to the number of Pennsylvania units in order to allow for their greater weight, capacity, and length. Some of the objections to the wheelage theory are based on the difference in kind of operation. The Commuters assert in connection with the tunnels in zone 2 that instead of all four being treated on the wheelage basis the Long Island should be charged with the costs of the two which it uses exclusively and with the wheelage proportion of the other two, which are primarily for the Pennsylvania's use. This intervener also argues that the non-variable costs of the terminal can not be consistently included in charges to which the wheelage factor is applied. Much was said about the density of operation of the Long Island, tending, as compared with the Pennsylvania's, to low unit [fol. 98g-23] costs, and it was claimed by the interveners that the wheelage apportionment would transfer this benefit to the Pennsylvania. With the increasing traffic of the Long Island, this will operate progressively to the Long Island's disadvantage. Here again the idea of costly facilities, not needed for rapid-transit purposes, is involved. As seen by the interveners, the Long Island is given limited facilities and these are used with great intensity. The layout, especially the building, was made to suit the Pennsylvania, and the investment was determined by its needs. It is claimed that few of the operating expenses in zone 1 depend on the number of cars operated, and that a large proportion of them is directly connected with operating the station. Attention was called to the station expenses in 1923, those for a more recent year not being supplied by the applicant. Of total expenses of $2,140,629 in the station zone, $1,247,221.38 was for station employees alone.

Of $368,820.09 spent for maintenance, $158,584.45 was for the station. Of 573 station employees in July, 1924, 459 were assigned to the Pennsylvania. The significance of these figures, when it is proposed to apply the wheelage factor to the operating costs of the entire terminal, is apparent. The Commuters' expert witness conceded that the present exclusion of the station costs limits materially the impropriety of applying the wheelage basis. But even for the facilities at track level he does not fully accept that method, suggesting that the commutation service of the Long Island requires a treatment based on the number of tracks actually needed if the layout were properly designed, with some consideration to the length of time occupied. His position in short is that the wheelage basis is not predicated upon the facilities needed or used by the Long Island. In the case of the Grand Central Station in New York, the use and requirements of the two operating [fol. 98g-24] carriers, he thinks, are practically identical and therefore that no better method than the wheelage basis can be found.

There is, as has been shown, a material difference between the dense suburban traffic of the Long Island, which makes for low unit operating expense, and the trunk-line traffic of the Pennsylvania, with heavy and comparatively infrequent trains and no suburban service. To allow for this with any degree of precision is, however, extremely difficult. It has been noted that one alternative to the wheelage method would be a flat division of the track-level facility expense in the ratio of six twenty-firsts to the Long Island and fifteen twenty-firsts to the Pennsylvania. In its brief the City recommends that the Long Island pay the Pennsylvania "a fair and just proportion" of the maintenance and operation expenses at the track level. Agreement among all the parties as to what would be a fair and just proportion is probably beyond hope of realization. In the opinion in case No. 2754, it was considered a significant fact that other tenant companies using the terminal had accepted the wheelage principle, and, after a careful review of the large mass of evidence which had been introduced, the conclusion was reached that the claimed benefits and detriments under that plan about offset each other. As to the effect of a continued increase in the Long Island's traffic, the interveners expressed concern over the mounting

charges to be borne by that carrier. On this point the Transit Commission's opinion to the effect that greater use should in common fairness call for higher rental, seems to be an adequate answer. Upon the whole, the wheelage measure of use as now computed can not well be discarded, but the manner of its application can be made to conform more closely with what are believed to be sound principles governing the joint use of facilities of the kinds here found, as discussed in connection with the recommendations hereinafter submitted.

[fol. 98g-25] With respect to the use of electric power furnished by the Pennsylvania to contact shoes on the Long Island's equipment, little objection was raised to the wheelage ratio. The applicant explained that the only method of direct and actual measurement of power would be by means of meters on each car, a very expensive alternative. As has been explained, the investment in power and distribution facilities properly assignable to the Long Island has not been determined and is to be fixed by agreement. The rate of interest to be applied is, as with the other facilities, 6 per cent, while the rate used in the existing agreement for the power system is 4.5 per cent.

Other than the facts already stated, the applicants do not offer much evidence in support of the proposed change of interest rate to be applied on the investment. It is suggested by them that something should be conceded to the fact that original cost of the property has been set up rather than value based on present prices, which, it is claimed, would be twice as great, and further, that no interest during construction was charged prior to 1920. Since the Pennsylvania did not finance its terminal construction through security issues specifically applicable thereto, the actual carrying charges are not known. A witness testifying as vice president and comptroller of both applicants stated that the cost of money to the Pennsylvania during the construction period between 1905 and 1910 was about 5 per cent. That appears to be the dividend rate on the Terminal Company's capital stock. On the Terminal Company's note of $58,600,576.95, 4.5 per cent is charged. Testimony showing that the Pennsylvania has increased the annual rate of dividends on its stock from 6 to 8 per cent, as well as issued a large amount of new stock, and that an average rate of 6.5 per cent is now paid on outstanding securities, would

not seem to be material. It is stated in the opinion in case [fol. 98g-26] No. 2754 that 6 per cent has been used in the Pennsylvania's contracts with the Lehigh Valley and the New Haven. But with the controlled Long Island, the situation is somewhat different, at least as seen by the interveners in this proceeding, especially as they claim that the Pennsylvania's action in charging off approximately one-half of the cost of the project indicated that it was to be treated as an unproductive investment. The City recommends a 4 per cent rate on station, tunnel, and track facilities, and 4.5 per cent on power. The Commuters suggest 4 per cent on the former. Both interveners base their view on the cost of money at the time of construction. The annual payment of the Long Island as interest on investment, omitting taxes, would be approximately $2,400,000 on the 6 per cent basis, $2,000,000 on the 5 per cent basis, and $1,600,000 on the 4 per cent basis. Under the terms of the present agreement, the Long Island's payment of interest in 1928 was $1,361,842.

To state in summary the conclusions reached from the evidence, the proposed agreement imposes unreasonable terms upon the Long Island in respect of the inclusion of the entire station in the investment in zone 1, and the inclusion of all operating expenses, maintenance, and taxes connected with the station, the indiscriminate application of the wheelage ratio both to basic values and to expenses, and the employment of 6 per cent as the annual rate of interest on the value of the facilities. While customary practices in joint-terminal agreements do not impose any rigid rules on other carriers, it may be noted that the agreement before the commission is unusual. The apportionment of carrying charges on terminal station buildings is in most cases on some basis other than the number of cars passing through the station zone. Doubtless the element of special privilege to the tenant carrier is given some weight or intangible value. Within reasonable limits, recognition of this consideration would be proper in the [fol. 98g-27] instant case and it can not be dismissed because of the fact that the terminal was designed primarily for the use and aggrandizement of the Pennsylvania. The following paragraphs contain suggested changes in the proposed contract. These are not designed to form a part of an order to be entered by the commission but merely

as indications to the applicant of suitable modifications which should be made. They do not fix the only conditions which may be proposed and receive favorable consideration. Nor is it intended that the terms and provisions of secondary importance be discussed here.

In view of all the circumstances, it appears that interest computed at 5 per cent on the cost as of a specified date of all the facilities, including the power and distribution system, would do substantial justice to the contracting parties. It would not be inappropriate to adopt the agreed values as of December 31, 1924, which appear in the contract of July 28, 1925, the last one executed. Subsequent additions and betterments may, as is provided under that contract, be charged at 6 per cent, with due regard to the allocation or division of physical property later suggested herein.

In the power and power-distribution part of the Terminal Company's property there is a very large division of the use, and the matter of carrying charges is involved with a determination of value assignable to the operation in zones 1, 2 and 3. In the case of Sunnyside Yard, zone 3, the track facilities are used to the extent of less than 12 per cent by the Long Island. The circumstances in both cases seem to permit the wheelage method to be applied with ease, and without material injustice, to interest charges, operating expenses, and taxes. The proposed agreement, if modified by the change of interest rate herein recommended, may be considered sufficiently equitable in [fol. 98g-28] these cases.

In zone 2, two tracks, mostly in tunnels, are exclusively used by the Long Island. The entire interest charges, operating expense, maintenance cost, and taxes for tunnels Nos. 3 and 4, with their tracks, approaches, etc., in zone 2 should be borne by the Long Island. The testimony is that in the morning rush hour the westbound Pennsylvania tunnel is used for about the same number of trains by each carrier. Assuming that similar conditions obtain during an hour in the evening, the two Pennsylvania tunnels, Nos. 1 and 2, are jointly and equally used for one-twelfth of the day. In 1928 the count of Pennsylvania cars in these tunnels was 915,947, but the record does not show the count of Long Island cars except as a total for all the tunnels. It is therefore impossible to state the wheelage relation for

tunnels Nos. 1 and 2. This relation should be ascertained and applied to the total operating, maintenance, and other expenses of the two Pennsylvania tunnels with their approaches, tracks, etc., as a basis for the Long Island payment. The interest on the cost of these tunnels and tracks may, under all the circumstances, be omitted.

In connection with the facilities at track level in zone 1, the applicants' exhibits show that the Long Island's use on a time-space basis is 50.66 per cent and on a wheelage basis is 41.44 per cent. The greater part of that company's business is virtually rapid transit, while none of the Pennsylvania's is of that character. About 80 per cent of the Long Island's trains are operated on tracks exclusively used by it. Four station tracks were originally assigned to the Long Island but, according to the evidence now presented, five may be considered to be devoted entirely to that road, and the northerly half of the approach between Sixth and Seventh Avenues should apparently be included in the same category. Yards B and C are exclusively Long Island facilities. It is reasonable to conclude that such part of [fol. 98g-29] the total capital cost at the track level in zone 1 as is connected with these platform and yard tracks should be assigned to the Long Island, and the entire interest should be charged to that company. A corresponding treatment should be given the maintenance and other expenses. The portion of the layout just described may be thus definitely allocated to the Long Island, and the amount of use would have no bearing on the rental to be paid. The remainder of the track-level facilities are in part used exclusively by the Pennsylvania and in part jointly used. Changes in track operation have resulted from the growth of traffic on the Long Island and will doubtless continue. At present it appears that 7 of the 16 remaining station tracks are exclusively utilized by the Pennsylvania. That proportion of the interest on total track-level investment and operating expenses should be carried by the Pennsylvania alone. On the nine tracks now used jointly, the relative daily use is shown as: Long Island, 100 trains or 908 cars; Pennsylvania 144 trains or 1,747 cars. Interest and expenses allocated to these joint tracks should be apportioned on the wheelage basis. As future revisions in operating the layout are found necessary, concurrent adjustments may be made in the division of interest, expenses,

and taxes. At all times the division should be based on the proportions of trackage solely used by each carrier and the proportion jointly used by both.

The facilities above track level in zone 1 consist of the main passenger station and the service building. The station space exclusively assigned to the Long Island for the use of its passengers is entirely on the exit-concourse level. While it is stated that such passengers use the Pennsylvania part of the station extensively, no count has ever been made of their number. Admitting that commuters do not need and do not regularly use the upper levels, many [fol. 98g-30] other Long Island passengers do find it convenient to pass through the main entrances, exits, and concourses of the building and use the waiting room, restaurant, and other public accommodations. An apportionment of the station facilities on the basis of actual use by the passengers is not susceptible of exact determination. As against the great preponderance in number of passengers on the Long Island there is the marked difference in the character of travel. On the whole, however, the situation appears not to warrant the inclusion of the entire building with its cost and expenses in the agreement, even acknowledging that it has a large traffic value. Attention should first be directed to the portion which was designed for and is devoted to the Long Island. There is evidence of overcrowding of those facilities, a condition that may be considered as corresponding with the increase in track facilities demanded by the growing suburban traffic, and there is testimony showing that the Long Island waiting room is not used by persons taking trains for the race tracks. But at least it is a definite fact that a large part of the exit-concourse level is purely a Long Island facility. While other parts are constantly used by incoming Pennsylvania passengers it is also true that all the facilities on the main concourse and main waiting room levels are open to and more or less used by Long Island passengers. An equitable division of the terminal above track level would be approximated by providing in the agreement for the assignment to the Long Island of such portion of the entire investment above track level as is represented by the whole exit-concourse level, together with an appropriate part of the cost of the service building. Taxes should be divided on the basis of the ratio so determined. Operating

expenses, including station employees, should be assigned directly where possible but otherwise should be divided according to the above ratio. Amounts received from con- [fol. 98g-31] cessions on the exit concourse should be credited to the Long Island.

It is recommended (1) that the commission find that the present and future public convenience and necessity require the operation by the Long Island under trackage rights over the railroad of the Terminal Company as described in the application, but that the terms of the proposed agreement dated November 13, 1928, attached to the application, are inequitable, (2) that the issue of a certificate of public convenience and necessity be deferred unntil an agreement shall have been submitted to the commission, the terms of which are found to be fair and reasonable, and (3) that the part of the application which is for an order under section 3(4) be dismissed.

[fol. 98h-1] INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

LONG ISLAND R. CO. TRACKAGE

Submitted January 28, 1930. Decided March 18, 1930.

1. Present and future public convenience and necessity found to require the continued operation by the Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue, in Sunnyside Yard, and the Pennsylvania Station, New York, N. Y., including the partial use of said yard, station, and appurtenant facilities, but the proposed terms covering such operation not found to be just and reasonable. That part of the application under section 1(18) of the act denied without prejudice.

2. That part of the application for an order under section 3(4) of the act dismissed.

Alfred A. Gardner, D. P. Williams, and Joseph F. Kaeny for applicants.

Arthur J. W. Hilly, Vincent Victory, M. Maldwin Fertig, and Harry Hertzoff for City of New York; George H. Stover and Edward M. Deegan for Transit Commission of the State of New York, and Maurice Hotchner for Association of Long Island Commuters, Incorporated, interveners.

Division 4, Commissioners Meyer, Aitchison, and Woodlock

REPORT OF THE COMMISSION

By DIVISION 4:

Exceptions to the report proposed by the examiner were filed and the case was argued orally.

On December 13, 1928, the Pennsylvania Railroad Company, lessee of the Pennsylvania Tunnel & Terminal Railroad, and the Long Island Railroad Company, carriers by railroad subject to the interstate commerce act, filed a joint application under section 1(18) of the act for a certificate that the present and future public convenience and necessity require the operation by the latter, under trackage rights, over that portion of the lessor company's railroad between Harold Avenue, in Sunnyside Yard, borough of Queens, and the Pennsylvania Station, borough of Manhattan, New York, N. Y., a distance of 4.2 miles, including the use of said yard and station, and the facilities and appurtenances thereof, and for an order under section 3(4) of the act requiring the use of said tracks and facilities by the Long Island Railroad Company on the terms and for the compensation agreed upon by the Pennsylvania Railroad Company and the Long Island Railroad Company. [fol. 98h-2] On May 21, 1929, an amended application was filed, in which the amounts of investment for the several major divisions of the jointly used facilities were revised. A proposed joint agreement dated November 13, 1928, effective July 1, 1928 was appended. The interveners all oppose the granting of the application. A hearing was held and briefs were filed.

For convenience, reference will be made in this report to the Pennsylvania Railroad Company as the Pennsylvania, to the Pennsylvania Tunnel & Terminal Railroad Company as the Terminal Company, to the Long Island Railroad Company as the Long Island, to the City of New York as the City, to the State of New York, as the State,

to the Transit Commission of the State of New York as the Transit Commission, to the Association of Long Island Commuters, Incorporated, as the Commuters, to the Lehigh Valley Railroad Company as the Lehigh Valley, and to the New York, New Haven & Hartford Railroad Company as the New Haven.

All the capital stock of the Terminal Company, and practically all the capital stock of the Long Island, are owned by the Pennsylvania, which operates the property of the former under a long-term lease pursuant to authority granted by us on August 4, 1928, 145 I. C. C. 283, but does not operate the property of the latter. Broadly considered, all the lines and facilities involved in this application are those of the Pennsylvania. But the rental to be charged to the Long Island is not an intercompany affair when the public may be materially affected as a result of the amount paid, and it is this consideration which forms the basis of the interveners' protest. According to the contention stoutly advanced, the increase which is now proposed over the present rental will, by reason of its effect on the earnings of the Long Island, be used as a basis for an attempt to raise the commutation fares on that road by application to the Transit Commission. The interveners claim that the terms of the agreement presented with the application would impose an unfair burden upon the Long Island, and they further represent that the commission is without jurisdiction in the premises but that the Transit Commission has in the past exercised its authority as granted by the State and should continue to do so.

It is true that the joint agreement under which the Long Island has been using these facilities since July 1, 1923, is one which was framed to meet the requirements of the Transit Commission, as expressed and made retroactive by their approval of the contract of July 28, 1925, after extended hearings and investigation. Prior agreements were also approved by the Transit Commission or its predecessor. It is true that the amount of rental which the Long Island pays to its parent company is a matter that primarily concerns intrastate passenger traffic, indeed hardly more than traffic with the suburban zone of the city, and that the public interest affected might appear to be entirely local. These facts do not however, place the granting of authority covering these trackage rights beyond

the purview of section 1(18). The existing agreement of the Pennsylvania and the Long Island was on a yearly basis. It technically expired on December 31, 1925, and was extended for one year. The desire now being to establish a more permanent arrangement, the proposed agreement is for a term of 20 years beginning July 1, 1928. The granting of authority for the applicants' proposal under section 1(18) is both necessary and appropriate, and there is no sound reason preventing the assumption of jurisdiction by us under this part of the act, even though joint operation began prior to the effective date of the transportation act, 1920, and has been continuous. As to section [fol. 98h-3] 3(4), which provides for the compulsory opening of one carrier's terminal facilities to another carrier when the public interest requires such use, there is nothing in the situation here presented which brings it within the terms of that paragraph. By voluntary arrangements between the parties the Long Island has been using the tunnel, yard, and terminal facilities provided for it by the Pennsylvania in New York since September 8, 1910. There is no suggestion that the Pennsylvania intends to discontinue this privilege. The question of compensation is indeed at issue, but, contrary to the applicants' understanding of the force of this fact, associated as it is with the close corporate relationship between the companies, the applicability of section 3(4) does not appear. Accordingly, the fixing of compensation as therein provided on the principle controlling compensation in condemnation proceedings, may be disregarded. That part of the application which is under section 3(4) will therefore be dismissed. The reasonableness of a joint facility rental is in general a matter of public interest, as well as a matter which may affect the operations of the carriers in interstate commerce, and should be considered by us in reaching a finding of public convenience and necessity. Thus, the financial as well as the transportation features of the present application may be fully recognized and dealt with under the authority conferred by section 1(18). In cases of extensions of operations under trackage rights the cost of the applicant companies is not less important than in cases of extension by construction, acquisition, or lease. A mo-

tion to dismiss the application on the ground of lack of jurisdiction was properly denied.

The contentions of counsel for the Transit Commission are in substance that, assuming we have any jurisdiction, our certificate should be based primarily on the showing of public convenience and necessity, and that the only requirement pertaining to rental terms which we should recognize is that the operation will not weaken the user. It is claimed that both carriers here have prospered under the existing agreement. It is also claimed that we have no power to prevent the parties changing the terms of an agreement covered by our certificate after such certificate shall have been issued. Counsel ask that we issue an unconditional certificate, leaving the question of rental to the judgment of the Transit Commission, which, under the power conferred upon it by section 148 of the railroad law of the State, may withhold permission for the Long Island's operation until a compensation which it considers reasonable be agreed upon, and submitted along with the application for authority to operate. Counsel for the city argue that section 1(18) of the act, if applicable, does not require us to determine compensation, and that, in view of the fact that the Long Island's traffic at the terminal is intrastate, we should not exercise jurisdiction in this case.

The power conferred upon us by the act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary. The case is brought to issue mainly because of the possibility of increased fares on the Long Island, but consideration of the questions of rental, degree of use, and the like which are now presented must be weighed entirely on the showing of fairness and reasonableness and should not be influenced by the contingency emphasized by the protestants. The Pennsylvania and the Long Island are entitled to equally fair treatment in the matter. The terms of past agreements are not before us for approval.

[fol. 98h-4] The Pennsylvania completed in 1910 its extensive project of establishing a passenger terminal in New York. As shown by the record, provision was made for the accommodation of the Long Island's passenger traffic into and out of the city by constructing two single-track tunnels under the East River, tracks and platforms

in the terminal, and other facilities for the Long Island's use. That carrier's operation into the terminal has been continuous for 19 years, during which period the number of passengers handled annually has more than trebled and the earnings of the company have risen from a deficit of $510,221 in 1920 to a net income of $4,682,656 in 1928. Instead of the former ferry connection on the East River between Long Island City, in the borough of Queens, and the foot of Thirty-fourth Street, in the borough of Manhattan, the Long Island has enjoyed the great advantage of a direct rail connection with Pennsylvania trains, city subways, etc., at the Pennsylvania terminal. The service to the public and the benefit to the carriers by the operating arrangement between these companies are well established and are entirely uncontroverted. The need for continued operation by the Long Island in this manner may be safely assumed to have been demonstrated.

The Terminal Company's property represents that of two predecessor companies, the Pennsylvania, New York & New Jersey Railroad Company and the Pennsylvania, New York & Long Island Railroad Company, whose ownership embraced, respectively, the new facilities in the States of New Jersey and New York. There were constructed two single-track tunnels under the Hudson River, a yard and passenger station in the borough of Manhattan, four single-track tunnels extending easterly beneath the city and the East River, and the Sunnyside Yard, in the borough of Queens, on Long Island. Provision was made for electric operation. The total expenditure approximated $115,000,000, which was covered in part by $25,000,000 of Terminal Company stock and a certificate of indebtedness of $84,861,000 issued to the Pennsylvania. The certificate was placed on the Pennsylvania's books at $57,461,000; the Terminal Company's stock was "marked down," and the total amount finally written off was about $59,000,000. The average cost of money during the construction period, 1905-1910, was about 5 per cent.

Besides the Pennsylvania and the Long Island, the terminals and tunnels are used by the Lehigh Valley and New Haven. In the studies of traffic, etc., the cars of these lines have been combined with those of the Pennsylvania, and they may be considered as having no material bearing in a determination of the questions involved except where

specifically mentioned. The fundamentals of the case consist of defining the physical limits of property jointly used and property exclusively used by the Long Island and the Pennsylvania, together with the respective values thereof and the annual rate of interest to be applied thereon, and of fixing a suitable measure of the relative use of the facilities within each physical division of the property.

Omitting the Terminal Company's line which is used solely by the Pennsylvania, namely the portion situated west of Tenth Avenue, borough of Manhattan, the facilities affected by the Long Island's operation are described as follows:

[fol. 98h-5] Zone 1

Bounded approximately by Sixth Avenue, Thirty-first Street, Tenth Avenue, and Thirty-third Street. Contains a track layout at a level about 47 feet below the street, with 21 tracks at platforms, the area being enclosed by retaining walls. The station building occupies the block between Seventh Avenue, Thirty-first Street, Eighth Avenue, and Thirty-third Street. The Long Island waiting room, concourse, etc., are located on the level immediately above the tracks. Above this are five other floor levels, arranged as Pennsylvania facilities. Long Island trains do not proceed west of Tenth Avenue.

Investment stated for zone 1, as of July 1, 1928, $46,896,746.94.

Zone 2

Embraces four single-track tunnels extending easterly from zone 1 under East River, together with tracks running to Harold Avenue, borough of Queens, where connection is made with the Long Island's lines. Two of the tunnels are exclusively used, and two partly used, by the Long Island.

Investment stated for zone 2, as of July 1, 1928, $32,605,521.38.

Zone 3

Embraces Sunnyside Yard and adjacent facilities near Harold Avenue. These facilities are primarily for the storage and handling of Pennsylvania cars. Several tracks are used, however, by the Long Island for storing such

trains as are hauled by electric locomotives into the station in zone 1.

Investment stated for zone 3, as of July 1, 1928, $8,623,170.90.

If the foregoing amounts of investment be added to the cost of the Pennsylvania tunnels west of Tenth Avenue, as shown by an exhibit of record, the grand total is $106,744,446. The final value of the Terminal Company's owned property as of June 30, 1918, found by us for rate-making purposes but not introduced as evidence in this proceeding, is $120,885,852. The basic amounts set up by the applicants in the proposed agreement were not contested per se, the main point raised in this connection being whether or not the station building should be excluded because not being required for the Long Island's use. The basic amounts represent original cost.

For the electric power plant in Long Island City and the distribution system, no amount is included in the foregoing investment for the three zones. It is provided in the proposed contract that a value be agreed upon for these facilities by the parties. In the 1925 agreement a value of $9,189,677 was used. As the central plant furnishes power for the operation of Long Island trains outside of the terminal area, as well as for trains of the Hudson & Manhattan Railroad between Newark and Jersey City, N. J., a comparatively small part of its output is used by trains of the Pennsylvania and Long Island moving over the Terminal Company's tracks. This is the reason given for the omission of a specific sum in the agreement. It is not clear why the applicants can not arrive at an understanding as to value at this time.

[fol. 98h-6] Since September 1, 1910, five successive operating agreements between the carriers have been in force. In each instance there was voluntary submission to the State commission, as required by State law. Under the terms of all these contracts, operating expenses were apportioned between the Pennsylvania and the Long Island on a wheelage basis, which is the ratio of the car movements of each carrier to the total car movements, in each zone. Except in the first agreement, taxes were divided on that basis. The Long Island paid fixed rentals or interest on the investment in amounts varying from $156,000 to $300,-

000 per annum. In June, 1923, the carriers applied to the Transit Commission for approval of a new contract under the terms of which the Long Island would have paid a total of $2,665,165 for rental, operating expenses, taxes, and use of power in 1922, as compared with a total of $1,660,165 actually paid under the existing agreement. Concurrently the Long Island applied for authority to increase fares on its suburban lines within the city. An investment of $83,306,191 was set up in the new agreement for the property in zones 1, 2, and 3, and the Long Island was to pay annually a sum corresponding to such portion of 4 per cent on this investment as the number of its car movements bore to the total number of car movements. Under this principle there would have been an increase of about $1,000,000 in the rental payment alone. This was considered unfair to the Long Island because of the alleged relatively small need of that carrier for the elaborate terminal erected by the Pennsylvania. Exception was taken to the distribution of operating expenses on a wheelage basis, notably with respect to the large item of station employees. The agreement provided for interest on the power plant and distribution system on the basis of 4.5 per cent, which was the same rate as applied in the earlier contracts. In this case, known as No. 2692, and hereinafter so called, the Transit Commission held hearings during approximately two months, and then entered an order denying the application and disapproving the agreement.

In March, 1925, the carriers submitted to the Transit Commission the modified agreement under which operation is now carried on. After hearing in a case known as No. 2754, the Transit Commission approved this agreement and permitted it to become retroactive to July 1, 1923. In order to meet the Transit Commission's previous objection, the applicants eliminated from the invest nent in zone 1 the sum of $15,000,000 as representing the station building above track level, and from operating expenses the corresponding expenses and taxes. The interest rate, however, was proposed to be raised from 4 to 5 per cent. In net effect there would have been a reduction of about $353,000 from the annual payment of the Long Island as compared with the plan which had been disapproved in case No. 2692. In the deciding opinion in the proceeding it was concluded that the wheelage basis of apportionment was probably the

most practical and common-sense method that could be used. It was decided that no change in the $15,000,000 adjustment was required because of such costs as real estate and excavation in zone 1, which the interveners contend should not all be left in the investment that is used in the proposed contract. The opinion held that the charging off by the Pennsylvania of about one-half the investment in the terminal property did not affect the merits of the rental question. The proposed change in interest rate to 5 per cent was disapproved and the parties required to maintain the same rates that were incorporated in the contract last submitted to the Transit Commission, viz, 4 per cent on the adjusted investment in zones 1, 2, and 3, and 4.5 per cent on the electric distribution and power system. The more important provisions of the approved agreement of July 28, 1925, follow: The wheelage ratio, in which one locomotive is counted as three cars, is applied to the interest [fol. 98h-7] at 4 per cent on a total value of $70,392,230 for the jointly-used facilities in zones 1, 2, and 3, from which the station facilities above track level are excluded. The wheelage ratio is also applied to all operating expenses, maintenance, and taxes at track level. Interest is accrued on the cost of future additions and betterments to the property at 6 per cent. On the agreed value of $9,189,677 for the electric power and distribution system as of December 31, 1924, interest at 4.5 per cent is applied. The sum decided upon for the station building was composed principally of $14,092,499 for the structure proper, and $860,000 for one-half of a service plant on Thirty-first Street which is used to supply light, heat, and power to the station.

The plans of the carriers in all these cases were actively opposed by the City, the Commuters, and others. After joint hearing before the Transit Commission and the Public Service Commission of the State of New York, the Long Island's application for authority to increase its suburban fares was denied. As has been stated, the Transit Commission joins with the City and the Commuters in opposition to the granting of the application pending before us.

A statement of the total costs attached to the facilities under discussion, including the station, before any allocation between the carriers is made, for the year 1928 is given below:

	Zone 1	Zone 2	Zone 3	Totals
Valuation	$46,896,747	$32,605,521	$8,623,171	$88,125,439
Interest at 6 per cent	2,813,805	1,956,331	517,390	5,287,526
Taxes	903,101	494,218	94,011	1,491,330
Operating expenses	2,735,386	243,804	513,052	3,492,242
	6,452,292	2,694,353	1,124,453	10,271,098
Credit from concessions	1,040,929	21,964	63,393	1,126,286
Net totals	5,411,363	2,672,389	1,061,060	9,144,812

With the use varying according to the wheelage ratio in each zone, the Long Island paid to the Pennsylvania the following total amounts in 1928, under the terms of the existing contract:

Operating expenses	$459,902
Interest on investment	1,361,842
Taxes	550,398
Total	2,372,142
Cost of electric power and interest on power facilities	324,416
Direct operating charges	138,623
Grand total	2,835,181

As compared with the sum of $2,372,142, covering facilities other than electric power, the Long Island would pay under the agreement now proposed:

Interest at 6 per cent	$2,400,921
Taxes	681,384
Operating expenses	1,339,194
	$4,421,499
Proportion of credit from station concessions	451,880
	3,969,619

[fol. 98h-8] Under the proposed arrangement, the station building is reinstated in the investment. The items of operating and maintenance expenses previously withdrawn as pertaining to the station above track level also have been included. The interest rate has been increased from 4 per cent to 6 per cent on present value, or investment. Allowance is made for the first time for rentals received by

the Pennsylvania from offices, stores, and other concessions in the station. As under the existing contract, the aggregate of interest, taxes, and operating expenses in each zone is to be the base to which the wheelage measure in that zone is applied. For 1928, the wheelage ratios for the Long Island were as follows: Zone 1, 41.44 per cent; zone 2, 59.94 per cent; zone 3, 11.60 per cent. It was stated that there would be an increase of approximately $20,000 in the annual charge for power, which is apparently due to the change in interest on the investment from 4.5 per cent to 6 per cent. There would be no change in the direct operating charges. The agreement contains provision for revision at the end of 5-year periods with respect to the rates of interest and the bases upon which they are computed.

It is made plain that no increased benefits are to be enjoyed by Long Island passengers by reason of the proposed contract, as the facilities used by them will be the same as at present. The applicants contend, however, that the proposed agreement is fair and equitable, that the wheelage method of apportionment is the fairest and most practical method of determining compensation for use of a joint facility, that the station building should be included since it is largely and increasingly used by Long Island passengers, and that the tracks and platforms in zone 1, taken as a whole, are used to practically the same extent by both roads.

Reflecting the growth of passenger business on the Long Island and the lack of such growth on the Pennsylvania, attention is called to the fact that nearly 50,000,000 Long Island passengers passed through the terminal in 1928, while the Pennsylvania had only 10,000,000. An engineer testifying for the applicants claimed that the value of the use to the Long Island can not practicably be determined, but that the plan attempts to measure the relative use actually made of the facilities. In defense of the 6 per cent interest rate, it is argued that that rate is practically the legal one in New York and Pennsylvania and is the rate prescribed in the transportation act for loans from the fund created by recapture.

To all the main features of the proposed agreement and to the applicants' contentions in support of them, the interveners emphatically object, particularly as regards zone 1. The position of the City and the Commuters was devel-

oped in great detail in the Transit Commission hearings hereinbefore mentioned, and it is evidently intended that we should recognize the facts and considerations which were matters of evidence in the Transit Commission cases. To the extent that such evidence is included in the present record this may be done. In the statement of facts following it will be understood that the Pennsylvania's operation includes equipment of the Lehigh Valley and the New Haven.

[fol. 98h-9] The multiple-unit electric trains of the Long Island move over main lines and at least 10 different branches on Long Island to the Flatbush Avenue Terminal in the borough of Brooklyn and the Pennsylvania Terminal in the borough of Manhattan. Because of the numerous suburban routes, scheduled service rather than headway service is required. In connection with the Pennsylvania Terminal, tunnels Nos. 3 and 4 in zone 2 are assigned to the Long Island, and tunnels Nos. 1 and 2 to the Pennsylvania, but in the hours of heavy traffic it is necessary for the Long Island to use all the tunnels. At the Manhattan terminal about 75 per cent of the Long Island trains are stored during the day in yards B and C, and to some extent in yards A, D, and E, all these yards being located at the west end of the track area. Certain trains, however, are sent back from the platforms at which they arrive, and a few others, which are hauled by electric locomotives, are taken, to Sunnyside Yard for storage, cleaning, etc. In the terminal plan the Long Island was originally assigned four platform tracks, viz., Nos. 18, 19, 20, and 21, and partial use of three others, viz., Nos. 15, 16, and 17. According to the applicants' witnesses, the Long Island now uses four tracks exclusively and 11 tracks jointly with the Pennsylvania. On joint tracks Nos. 5, 6, 8, and 9, some 16 Long Island trains carrying 13,000 passengers are brought in during the morning rush hour. In addition to its regular traffic, the Long Island also runs from 4 to 10 trains daily in the racing season between May and October, using tracks Nos. 15 and 16. Passengers for these trains depart from the Pennsylvania concourse on the level next above the Long Island concourse and do not use the Long Island waiting room. The Pennsylvania has practically no suburban business at this station, such traffic being handled at the down-town terminal of the Hudson & Manhattan Railroad. At the maximum

the Long Island brings in 36 trains per hour, unloads a train in four minutes, and starts a train out from each platform every 10 to 12 minutes. Pennsylvania trains generally remain 20 minutes at the platforms, except in the case of Pullman sleeping cars which are brought into the terminal at about 10 p. m. and stand ready for occupancy until they depart between 11 p. m. and 2 a. m. If the total traffic in the whole period of 24 hours be considered, the Long Island has an average of 76 trains per track on five tracks for an average time of 14 minutes each, and 11 trains on nine tracks for an average time of 21 minutes each. As compared with this the Pennsylvania has 13 trains per track on seven tracks and 16 trains on nine tracks for an average time of 61 minutes each. The Long Island has an extremely heavy peak traffic which far exceeds the density on the Pennsylvania. In the rush period the Long Island hourly sends 25 trains through its tunnel and 11 trains through the Pennsylvania tunnel in zone 2. The Pennsylvania has operated 15 trains per hour but the usual number is about five. It is clear that the principal operation of the Long Island in the terminal is of a different character from that of the Pennsylvania.

A count made during a 24-hour period in March, 1929 shows the relative use of station tracks in zone 1 to be as follows:

	Long Island	Pennsylvania
Number of trains, eastbound	243	120
Number of trains, westbound	238	113
Number of trains, total	481	233
Number of cars eastbound and westbound, counting one locomotive as three cars	3,860	2,772
Switching movements	193	540
Total time occupied	126 hrs., 22 mins.	236 hrs., 13 mins.

[fol. 98h-10] For the year 1928 the total number of car movements in the three zones were as shown below:

	Long Island		Pennsylvania	
	Number	Per cent	Number	Per cent
Zone 1	1,370,677	41.44	1,936,754	58.56
Zone 2	1,370,677	59.94	915,947	40.06
Zone 3	110,874	11.6	844,715	88.4

It is pointed out that, in general, the Pennsylvania trains make four movements at the terminal by reason of storing cars at the Sunnyside Yard in zone 3, while the Long Island trains make but two movements, their cars being stored in

the terminal, zone 1. Later in this report the method of counting cars will be discussed.

Another 24-hour count shows the average number of cars stored in the yards at the station as follows:

	Long Island cars	Pennsylvania cars
Yard B	17.8	0
Yard C	39.8	0
Yards A, D, and E	26.3	37.1

The applicants compiled and introduced a statement of the length of tracks and platforms occupied by the trains of each carrier at the station, and the respective time of their occupation, from which it was deduced that the total track area of 1,214,449 square feet should be apportioned in the ratio of 49.34 per cent to the Long Island and 50.66 per cent to the Pennsylvania. It was shown that 48,540,920 Long Island passengers arrived at and departed from the terminal in 1928, as compared with 10,597,115 Pennsylvania passengers. The time is thought to be approaching when a greater number of persons can not be handled by the Long Island at this station, and there is under consideration a new and additional terminal at Diagonal Street in Long Island City. It is believed that the limit of capacity has been reached at one hour of the morning and one hour of the evening, and that the only way in which more passengers could be carried would be by adding two cars to each train of 10 cars.

In connection with the evidence pertaining to the track facilities in zone 1 and their use, it may be stated that the Commuters introduced testimony by an expert witness, and contend in their brief, that the Long Island requires but six station tracks and therefore that it should be charged with only six twenty-firsts of the investment and expenses at track level. This intervener considers that the Long Island uses virtually five tracks exclusively and nine other tracks jointly, and that the aggregate number of trains on the latter is such that one additional exclusive track would be sufficient to meet the road's needs had the general layout been designed with due regard to the Long Island's operation. It is further claimed that the Long Island's use of the joint tracks does not interfere with the comparatively small requirements which the Pennsylvania has for them.

Concerning these suggestions the applicants' engineer explained that no rigid division of track space would be desirable since efficient operation requires that the tracks be used according to the varying demands of the two carriers [fol. 98h-11] at different times during the day and night. As having some bearing on the division of space, a study presented by the City in case No. 2692 indicated that the trackage originally assigned to the Long Island at the station corresponded to 12.72 per cent of the total volume of space at that level.

With respect to the station facilities above track level, the existing contract represents the insistence of the Transit Commission on the deletion of their cost from the investment because of the consideration that this large station is not needed for commutation traffic. It also represents the Transit Commission's desire to have the old 4 per cent interest rate retained. These concessions by the carriers were generally looked upon as mitigating the alleged injustice of the wheelage ratio. Under such circumstances it is not surprising that a proposal to include the entire investment and to raise the interest rate, while retaining the wheelage provision as before, should bring forth a strong protest. As already stated, all ticket offices, waiting rooms, and other station facilities assigned to the Long Island are located on the exit-concourse level immediately above the tracks and reached therefrom by stairways. The westerly part of the general concourse space on this level is used by incoming passengers of the Pennsylvania. The three areas on this level devoted to the Long Island for various purposes were estimated respectively at 100 by 100 feet, 150 by 200 feet, and 50 by 150 feet. As the floor areas in the entire building were not calculated by the witness who testified as to these figures, they can not be consistently utilized in computing an apportionment of the total station space. In case No. 2692 the City introduced a computation which purported to show that the Long Island occupied only 1.559 per cent of the total cubic feet in the structure. The Long Island waiting room has been reduced in size and the concourse enlarged, but this is not understood to affect the aggregate area occupied, which is said to be larger than that originally assigned. The Long Island's waiting room facilities are smaller and less elaborate than those on the station levels above them, but the applicants contend that

the commuters, constituting from 70 to 75 per cent of all Long Island passengers, require only the relatively small waiting room space that has been provided. However, it seems that those persons who are obliged to wait a considerable length of time make use of the Pennsylvania's main waiting room because of the crowded conditions below. Passengers going to the race trains do not occupy the Long Island waiting room at all, and it was testified that Long Island passengers in general use the Pennsylvania part of the building extensively. With the approaching opening of a new subway on Eighth Avenue and the connection of its station with the Pennsylvania Terminal, Long Island passengers will make a still greater use of the building in passing between their trains and that subway station. As to the spaciousness and elaborateness of the terminal, the applicants argue that these features are and have been as much an advertisement for the Long Island as for the Pennsylvania, and that the increase in business and earnings of the former carrier is largely due to these circumstances. While the Long Island has no rail competition in its territory, it competes with roads which serve other suburban residential districts and thus may be fairly considered to derive a general benefit from the attractiveness of its city terminal. From a purely utilitarian point of view it may be conceded that the frequent suburban service of the Long Island, almost but not entirely equivalent to the headway operation performed by the Hudson & Manhattan, does not need a monumental type of terminal build-
[fol. 98h-12] ing. At the same time, the fact is that a steady and substantial increase has taken place in the Long Island's traffic without much change in that of the Pennsylvania. If between 70 and 75 per cent of the Long Island's passengers are regular commuters, the others somewhat outnumber the total of all Pennsylvania passengers which use the station. Built primarily for the Pennsylvania, with some 12,000 miles of line within its system, the terminal seems to have become far more of a facility for the Long Island, with 400 miles of line, than was originally contemplated.

The Commuters stress the fact that the $15,000,000 value placed upon the station above track level reflects nothing for the cost of excavation, land, and other items, and they say that the amount should probably have been over $25,-

000,000. In a statement showing a separation of the costs in zones 1, 2, and 3, as of December 31, 1923, the charges under buildings include $14,092,499.11 to Station-Manhattan, and $1,713,041.67 to Service Plant-Manhattan. The same statement shows for zone 1 real estate, $11,484,551.16, easements, $1,800,796.25, taxes $1,429,316.37, and grading, $7,201,008.24. No separate item for retaining walls is found, and according to the testimony for the applicants, no part of that cost was included in the $15,000,000, but is included, together with all the land, excavation, etc., under the existing agreement in the investment for zone 1 upon which the Long Island pays its proportion of interest. The theory by which this is done must assume that the costs described would have been incurred in any case by the construction of the track layout itself. The station structure occupies approximately one-fourth of the total length, east and west, of zone 1. Evidently the Transit Commission did not withhold its approval of the $15,000,000 adjustment because no part of these other costs were incorporated therein.

In case No. 2692, the Commuters made a showing of the Long Island's terminal costs in zone 1 as compared with the terminal costs of the Hudson & Manhattan in New York, and the City presented an engineering report in which a hypothetical terminal at Thirty-third Street and Fourth Avenue, Manhattan, together with two tunnels extending to Long Island, were projected and estimated. The cost of the station building in the latter study was shown as $3,549,000, and that of the whole project as $20,296,275. These showings have something more than an academic interest, yet it is existing conditions which must be dealt with, even though those conditions are not all definitely determinable. In the opinion in case No. 2692, it was said that "it is very difficult, if not impossible, to determine upon any basis of mathematics, what percentage of the cost of these terminal facilities should be charged as a monument to the renown of the Pennsylvania Railroad."

As the interest on value, operating expenses, and taxes are all to be apportioned under the proposed agreement on the wheelage or car movement basis, this provision is an important consideration. No change has been made or is intended to be made in the method of counting cars which has been followed since 1910. A separate count is made in

each zone, and the applicants claim that the result is very much in favor of the Long Island. The cars of multiple-unit trains do not have to be switched to the same extent that those of steam trains do, nor is the same amount of cleaning and reconditioning required. There are consequently not so many movements of empty cars by the Long Island as by the Pennsylvania. Since revenue trains of the Long Island do not pass through Sunnyside Yard, it will be sufficient to describe the operation in zones 1 and 2. [fol. 98h-13] The cars of each road are counted once as they enter zone 1, once as they leave it, and once as they pass through zone 2. A Long Island train coming westbound, stopping or laying over at the station, and returning eastbound is counted a total of four times in these two zones. A Pennsylvania train coming in eastbound, stopping at the station, passing through the tunnel in zone 2 towards Sunnyside Yard for storage, and later repeating the movement westbound, is counted a total of six times, which includes the non-revenue movements in zone 2. In but five cases in 100, where a Pennsylvania train returns to the west from the station without going to Sunnyside Yard are Pennsylvania cars counted only twice. A slight inequity to the Long Island may be found in the fact that not all of the Long Island cars traverse the entire length of zone 1. To the objection that Pennsylvania cars are of greater weight than Long Island cars, it is stated that the latter are accelerated faster, requiring a greater proportion of power in a short run, that the steam used for heating the Pennsylvania cars is charged directly to that company, and that an average Long Island car brings in two or three times as many passengers as a Pennsylvania car. For these and other reasons it is not considered necessary to apply a factor of adjustment to the number of Pennsylvania units in order to allow for their greater weight, capacity, and length. Some of the objections to the wheelage theory are based on the difference in kind of operation. The Commuters assert in connection with the tunnels in zone 2 that instead of all four being treated on the wheelage basis the Long Island should be charged with the costs of the two which it uses exclusively and with the wheelage proportion of the other two, which are primarily for the Pennsylvania's use. This intervener also argues that the nonvariable costs of the terminal can not be consistently included in charges to which the wheelage factor is applied.

Much was said about the density of operation of the Long Island, tending, as compared with that of the Pennsylvania, to low unit costs, and it was claimed by the interveners that the wheelage apportionment would transfer this benefit to the Pennsylvania. With the increasing traffic of the Long Island, this will operate progressively to the Long Island's disadvantage. Here again the idea of costly facilities, not needed for rapid-transit purposes, is involved. As seen by the interveners, the Long Island is given limited facilities and these are used with great intensity. The layout, especially the building, was made to suit the Pennsylvania, and the investment was determined by its needs. It is claimed that few of the operating expenses in zone 1 depend on the number of cars operated, and that a large proportion of them is directly connected with operating the station. Attention was called to the station expenses in 1923, those for a more recent year not being supplied by the applicant. Of total expenses of $2,140,629 in the station zone, $1,247,221.38 was for station employees alone. Of $368,820.09 spent for maintenance, $158,584.45 was for the station. Of 573 station employees in July, 1924, 459 were assigned to the Pennsylvania. The significance of these figures, when it is proposed to apply the wheelage factor to the operating costs of the entire terminal, is apparent. The Commuters' expert witness conceded that the present exclusion of the station costs limits materially the impropriety of applying the wheelage basis. But even for the facilities at track level he does not fully accept that method, suggesting that the commutation service of the Long Island requires a treatment based on the number of tracks actually needed if the layout were properly designed, with some consideration to the length of time occupied. His position in short is that the wheelage basis is not predicated upon the facilities needed or used by the Long Island. In the case of the Grand Central Station in [fol. 98h-14] New York, the use and requirements of the two operating carriers, he thinks, are practically identical and therefore that no better method than the wheelage basis can be found.

There is, as has been shown, a material difference between the dense suburban traffic of the Long Island, which makes for low unit operating expense, and the trunk-line traffic

of the Pennsylvania, with heavy and comparatively infrequent trains and no suburban service. To allow for this with any degree of precision is, however, extremely difficult. It has been noted that one alternative to the wheelage method would be a flat division of the track-level facility expense in the ratio of six-twenty-firsts to the Long Island and fifteen-twenty-firsts to the Pennsylvania. In its brief the City recommends that the Long Island pay the Pennsylvania "a fair and just proportion" of the maintenance and operation expenses at the track level. Agreement among all the parties as to what would be a fair and just proportion is probably beyond hope of realization. In the opinion in case No. 2754, it was considered a significant fact that other tenant companies using the terminal had accepted the wheelage principle, and, after a careful review of the large mass of evidence which had been introduced, the conclusion was reached that the claimed benefits and detriments under that plan about offset each other. As to the effect of a continued increase in the Long Island's traffic, the interveners expressed concern over the mounting charges to be borne by that carrier. On this point the Transit Commission's opinion to the effect that greater use should in common fairness call for higher rental, seems to be an adequate answer. Upon the whole, the wheelage measure of use as now computed can not well be discarded, but the manner of its application can be made to conform more closely with what are believed to be sound principles governing the joint use of facilities of the kinds here found.

With respect to the use of electric power furnished by the Pennsylvania to contact shoes on the Long Island's equipment, little objection was raised to the wheelage ratio. The applicant explained that the only method of direct and actual measurement of power would be by means of meters on each car, a very expensive alternative. As has been explained, the investment in power and distribution facilities properly assignable to the Long Island has not been determined and is to be fixed by agreement. The rate of interest proposed to be applied is, as with the other facilities, 6 per cent, while the rate used in the existing agreement for the power system is 4.5 per cent.

Other than the facts already stated, the applicants do not offer much evidence in support of the proposed change of interest rate to be applied on the investment. It is sug-

gested by them that something should be conceded to the fact that original cost of the property has been set up rather than value based on present prices, which, it is claimed, would be twice as great, and further, that no interest during construction was charged prior to 1920. Since the Pennsylvania did not finance its terminal construction through security issues specifically applicable thereto, the actual carrying charges are not known. A witness testifying as vice president and comptroller of both applicants stated that the cost of money to the Pennsylvania during the construction period between 1905 and 1910 was about 5 per cent. That appears to be the dividend rate on the Terminal Company's capital stock. On the Terminal Com-
[fol. 98h-15] pany's note of $58,600,576.95, 4.5 per cent is charged. Testimony showing that the Pennsylvania has increased the annual rate of dividends on its stock from 6 to 8 per cent, as well as issued a large amount of new stock, and that an average rate of 6.5 per cent is now paid on outstanding securities, would not seem to be material. It is stated in the opinion in case No. 2754 that 6 per cent has been used in the Pennsylvania's contracts with the Lehigh Valley and the New Haven. But with the controlled Long Island, the situation is somewhat different, at least as seen by the interveners in this proceeding, especially as they claim that the Pennsylvania's action in charging off approximately one-half of the cost of the project indicated that it was to be treated as an unproductive investment. The City recommends a 4 per cent rate on station, tunnel, and track facilities, and 4.5 per cent on power. The Commuters suggest 4 per cent on the former. Both interveners base their view on the cost of money at the time of construction. The annual payment of the Long Island as interest on investment, omitting taxes, would be approximately $2,400,000 on the 6 per cent basis, $2,000,000 on the 5 per cent basis, and $1,600,000 on the 4 per cent basis. Under the terms of the present agreement, the Long Island's payment of interest in 1928 was $1,361,842.

To state in summary the conclusions reached from the evidence, the proposed agreement imposes unreasonable terms upon the Long Island in respect of the inclusion of the entire station in the investment in zone 1, and the inclusion of all operating expenses, maintenance, and taxes connected with the station, the indiscriminate application

of the wheelage ratio both to basic values and to expenses, and the employment of 6 per cent as the annual rate of interest on the value of the facilities. Upon the facts presented we find that the present and future public convenience and necessity require the continued operation by the Long Island, under trackage rights, over the railroad of the Terminal Company as described in the record, but that the terms of the agreement dated November 13, 1928, proposed to govern such operation, are not just and reasonable. An order will be entered denying that part of the application which is under section 1(18) of the act, without prejudice to the submission of a modified contract, and dismissing that part of the application which requests an order under section 3(4).

[fol. 98h-16] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

LONG ISLAND R. CO. TRACKAGE

ORDER—March 18, 1930

A hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the application of the Pennsylvania Railroad Company and the Long Island Railroad Company for a certificate of public convenience and necessity authorizing the latter to operate under trackage rights over the railroad of the Pennsylvania Tunnel & Terminal Company in New York, N. Y., under the terms of a proposed contract dated November 13, 1928, as described in the application and report aforesaid, be, and it is hereby, denied without prejudice.

It is further ordered, That the application of the Pennsylvania Railroad Company and the Long Island Railroad Company for an order under section 3(4) of the act requiring the use by the latter of the aforesaid railroad and facilities of the Pennsylvania Tunnel & Terminal Company under the terms of the aforesaid contract be, and it is hereby, dismissed.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[fols. 98i & 98i-1]

BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

Application of THE PENNSYLVANIA RAILROAD COMPANY, Lessee of The Pennsylvania Tunnel and Terminal Railroad, and THE LONG ISLAND RAILROAD COMPANY, under Paragraph (18) of Section 1 of the Interstate Commerce Act, for a Certificate of Public Convenience and Necessity Authorizing the Latter Company to Operate, under Trackage Rights, over that Portion of The Pennsylvania Tunnel and Terminal Railroad from near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, to Pennsylvania Station, Borough of Manhattan, City and State of New York, Including the Use of said Yard and Station and the Facilities and Appurtenances Thereof, and for an Order under Paragraph (4) of Section 3 of said Act, Requiring the Use of said Tracks and Terminal Facilities by The Long Island Railroad Company on Terms and for Compensation Agreed upon by The Pennsylvania Railroad Company and The Long Island Railroad Company

PETITION SUBMITTING MODIFIED CONTRACT AND ASKING THAT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BE ISSUED—December 23d, 1930

[fol. 98i-2] To the Honorable the Interstate Commerce Commission:

Your petitioners in this proceeding, Finance Docket No. 7308, respectfully represent to the Commission:

I

On March 18th, 1930, your Commission made the following order:

"Order—Entered March 18, 1930

A hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon,

which report is hereby referred to and made a part hereof:

It is ordered, That the application of the Pennsylvania Railroad Company and the Long Island Railroad Company for a certificate of public convenience and necessity authorizing the latter to operate under trackage rights over the railroad of the Pennsylvania Tunnel & Terminal Company in New York, N. Y., under the terms of a proposed contract dated November 13, 1928, as described in the application and report aforesaid, be, and it is hereby, denied without prejudice.

[fol. 98i-3] It is further ordered, That the application of the Pennsylvania Railroad Company and the Long Island Railroad Company for an order under Section 3 (4) of the act requiring the use by the latter of the aforesaid railroad and facilities of the Pennsylvania Tunnel & Terminal Company under the terms of the aforesaid contract be, and it is hereby, dismissed.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)"

The Report referred to in the foregoing order and made a part thereof is printed at 162 I. C. C. 218, et seq. and your petitioners ask that said Report be deemed to be part of this petition as if set forth herein in full.

Your peitioners have made a modified contract pursuant to the permission contained in the said order and report, subject to the approval of your Commission and submit it herewith for such approval. A copy thereof is hereto attached, forming a part of this petition, designated "Exhibit A". Resolutions adopted by the Board of Directors of The Pennsylvania Railroad Company, Lessee of the Pennsylvania Tunnel and Terminal Railroad Company, approving the agreement and authorizing the making and filing of this application are hereto attached, marked "Exhibit B". Resolutions adopted by the Board of [fol. 98i-4] Directors of The Long Island Railroad Company approving the agreement and authorizing the making and filing of this application are hereto attached, marked "Exhibit C".

II

The modified contract differs from the rejected agreement as follows:

(*a*) Rate of Interest on the Investment

The rate of interest is 5¾% of the investment on existing property and also on all additions and betterments. In the agreement not approved it was 6% on both.

This Commission found and determined as follows in its proceeding for reduced rates in 1922, No. 13293, In the Matter of Rates, Fares and Charges of Carriers by Railroad Subject to the Interstate Commerce Act, 68 I. C. C. 676 at page 734:

"That on and after March 1, 1922, a fair return upon the aggregate value of the railway property of the carriers defined in section 15a of the interstate commerce act, determined as therein provided, will be 5.75 per cent of such aggregate property value as a uniform percentage for all rate groups or territories designated by this commission."

Your petitioners respectfully submit that this is a deliberate and definite conclusion by your commission, after [fol. 98i-5] exhaustive examination, that 5¾% is a fair return on railroad property used in transportation.

By permitting the Long Island to use part of the Pennsylvania's property used in transportation, that is to say, by permitting the Long Island to enjoy a joint facility, the Pennsylvania gives up pro tanto the use of that property for its own transportation purposes. If it kept the whole exclusively for its own use it would be entitled to earn out of its transortation rates 5¾% on the value of its property. Having turned over its property in part to another transportation corporation it ought to receive pro tanto by way of rental from the other carrier enough to afford the 5¾% return which it, the Pennsylvania, is entitled to earn out of its transportation rates from those who use its whole system. It ought not to be compelled to accept less than a fair return for property turned over to another carrier to be used by such other carrier for its own transportation services. Stated in another way, 5¾% is a fair return on the owning carrier's property used in transportation. It ceases to use part of its property in transportation when it makes a joint facility agreement with another carrier. Pro tanto the property of the owning carrier becomes property used in transportation by the other carrier upon which the other carrier is entitled to a fair return of 5¾%.

[fol. 98i-6] It follows, your petitioners submit, that 5¾% is the rate which should measure what the Long Island ought to pay.

The fundamental principle that 5¾% constitutes a fair return on railroad property used in transportation remains always the same regardless of what the property may have cost or what its value may be at present-day prices and however such value at present-day prices is to be determined. As a matter of fact in the present instance the return asked for is to be a return on original cost, which, as pointed out in the report in this case, is much less than the final valuation of the terminal property found by your commission as of June 30, 1918.

What one railroad shall pay to another railroad for the use of its property in transportation is subject to regulation in the event that the joint facility owner and the joint facility user cannot agree, and where as in this case there is a common control of the owner and user such agreement as they may make is subject to regulatory scrutiny. When, however, the rate of return which in such a case is agreed upon corresponds to the rate which, pursuant to the statute, the Commission has ascertained to be a fair rate of return for property used in transportation, it is respectfully submitted there can be no ground for criticism.

[fol. 98i-7] It is perhaps unnecessary to direct attention to the fact that rents of this character are classified as joint facility rents and under the Transportation Act are one of the constituent factors used in ascertaining the amount of return known as "net railway operating income."

(b) Terminal Building Above the Track Level

By the agreement which the petitioners proposed in this proceeding but which your Commission disapproved the whole of the terminal station building above the track level was included in the investment and the wheelage basis was applied to the interest on that investment as well as to the operating and maintenance charges and taxes. Your Commission disapproved this and said (closing paragraph of the report, 162 I. C. C. at pp. 235 and 236):

"To state in summary the conclusions reached from the evidence, the proposed agreement imposes unreasonable

terms upon the Long Island in respect of the inclusion of the entire station in the investment in zone 1, and the inclusion of all operating expenses, maintenance, and taxes connected with the station, the indiscriminate application of the wheelage ratio both to basic values and to expenses, and the employment of 6 per cent as the annual rate of interest on the value of the facilities."

[fol. 98i-8] In order to meet the foregoing criticism petitioners in the modified agreement now presented for approval have omitted from the investment all of the terminal building above the track level thereby relieving the Long Island of making any contribution to the interest on the investment or taxes. Inasmuch as the Long Island is not charged with the interest and taxes of the station building it is not to be credited with net revenue from privileges, rents and concessions.

As to the operating and maintenance costs of the building above the track level the proposed agreement apportions them on fixed percentages, namely 1/5 to the Long Island and 4/5 to the Pennsylvania, which percentages are based upon a time study of the relative service performed by the station employees for each of the companies insofar as it is possible to segregate such services. This treatment of the terminal building above the track level seems to petitioners simpler and better than the complicated method suggested by the Examiner for determining the apportionment by a ratio based on the exit concourse level compared to the whole of the building above the track level.

The provision for five year renewals contained in the rejected contract is continued in the agreement now proposed thus allowing for readjustments as the services of the employees actually rendered to the respective companies may vary.

[fol. 98i-9] (c) Power Distributing Plant

Specified valuation for the power distributing plant is inserted in the contract to comply with the suggestion made in the report. It was omitted from the proposed agreement which your commission declined to approve.

(d) 5¾% instead of 5% is specified as the interest on deferred or delayed payments.

III

The effect of the present proposed agreement as reflected in the payments which would have been made by the Long Island Railroad Company in the year 1928 had its terms been followed compared with the payments made for the year 1928 under the agreement of 1925 and the payments which would have been made if the agreement disapproved by your Commission had been in force is shown below in parallel columns, the figures being approximate:

	Present proposed agreement	Agreement of 1925	The rejected agreement
Interest	$1,955,000	$1,362,000	$2,401,000
Maintenance and Operation	908,000	460,000	1,339,000
Taxes	550,000	550,000	681,000
Credit Account Concessions	.....	.....	452,000
Total	$3,413,000	$2,372,000	$3,969,000

[fol. 98i-10]

IV

Wherefore, your petitioners the said The Pennsylvania Railroad Company, Lessee of the Pennsylvania Tunnel and Terminal Railroad Company, and The Long Island Railroad Company pray that your Honorable Commission issue a Certificate of Public Convenience and Necessity authorizing The Long Island Railroad Company to operate, under trackage rights, over that portion of the Pennsylvania Tunnel and Terminal Railroad from near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, to Pennsylvania Station, Borough of Manhattan, City and State of New York, including the use of said Yard and Station and the facilities and appurtenances thereof on the terms and for compensation agreed upon by The Pennsylvania Railroad Company and The Long Island Railroad Company as set forth in the modified contract, Exhibit A."

Dated December 23d, 1930.

Respectfully submitted.

The Pennsylvania Railroad Company, by A. J. County, Vice-President. The Long Island Railroad Company, by G. Le Boutellier, Vice-President.

[fols. 98i-11 & 12] *Duly sworn to by A. J. County and G. Le Boutillier. Jurat omitted in printing.*

[fols. 98i-13 & 14] PETITIONERS EXHIBIT A

Agreement Between The Pennsylvania Railroad Company and The Long Island Railroad Company, Dated December 23d, 1930

Granting Trackage Rights to the Long Island Railroad Company Over the Tracks of the Pennsylvania Tunnel and Terminal Railroad Between Sunnyside Yard, Long Island, and Pennsylvania Station, New York City, Including the Use of Said Yard, Station, and Facilities

[fol. 98i-15] This agreement made this 23d day of December, in the year of our Lord One thousand nine hundred thirty (A. D. 1930) between The Pennsylvania Railroad Company, a Corporation of the State of Pennsylvania, Lessee, in possession of and operating the railroad and properties of Pennsylvania Tunnel and Terminal Railroad Company, party of the first part, and hereinafter designated "Pennsylvania Company" and The Long Island Railroad Company, a Corporation of the State of New York, party of the second part, and hereinafter designated "Long Island Company."

Whereas, by virtue of a certain indenture of lease bearing date the Fourteenth day of June, A. D. 1928, made and executed by Pennsylvania Tunnel and Terminal Railroad Company, as Lessor, and The Pennsylvania Railroad Company, as Lessee, said The Pennsylvania Railroad Company is in possession of and operating the railroad situate in the States of New Jersey and New York extending from a connection with the tracks of the United New Jersey Railroad and Canal Company in the Township of Kearney, County of Hudson, State of New Jersey, about two miles east of the center of Market Street, Newark, in said State of New Jersey, and extending eastwardly—generally through tunnels under the Hudson River, the Borough of Manhattan and the East River—to the Borough and County of Queens, City and State of New York, where it connects with the railroad of The New York Connecting Railroad Company; and a branch known as the Harrison Branch extending from a point on the main line about one-quarter of a mile east of the western end thereof, about one mile to or toward the town of Harrison, County of Hudson,

State of New Jersey; together with all of the sidings, tunnels, extensions, branches and all stations, depots, buildings, appurtenances and property of whatsoever kind and wheresoever situate now owned or which may be hereafter acquired by said Pennsylvania Tunnel and Terminal Railroad Company;

And Whereas, said The Long Island Railroad Company desires to acquire the right to use jointly with said The Pennsylvania Railroad Company the railroad tracks, sta- [fol. 98i-16] tions and facilities hereinafter mentioned, and The Pennsylvania Railroad Company is willing, upon and subject to the agreements, covenants, terms and conditions hereinafter set forth, to grant such right to The Long Island Railroad Company;

Now, therefore, this agreement witnesseth, That in consideration of the premises and of the payments to be made by the Long Island Company to the Pennsylvania Company as hereinafter provided, and in further consideration of the covenants and agreements hereinafter set forth to be kept and performed by each of the parties hereto, the parties hereby mutually covenant and agree each with the other as follows, to-wit:

First. The Pennsylvania Company, subject to all of the terms, conditions, stipulations, limitations and restrictions contained in the franchise, dated October 9th, 1902, granted to the Pennsylvania, New York and Long Island Railroad Company (one of the constituent Companies of the Pennsylvania Tunnel and Terminal Railroad Company) by the Board of Rapid Transit Railroad Commissioners for the City of New York, hereby grants to the Long Island Company for and during the term hereinafter specified trackage rights over the following tracks, and the right to use the following facilities and appurtenances for handling its passenger, baggage, mail and express traffic, but subject to the terms, conditions, limitations and restrictions hereinafter set forth: (a) Pennsylvania Station and yard between Tenth and Sixth Avenues, Borough of Manhattan, New York City; (b) the approaching tunnels and tracks eastward from Sixth Avenue to Harold Avenue in the Borough of Queens, where connection is made with the railroad of the Long Island Company; and if and when desired by the

Long Island Company (c) Sunnyside Yard and adjacent facilities in the Borough of Queens.

Second. The Pennsylvania Company will, from time to time, add to said portion of said railroad, Pennsylvania Station, Sunnyside Yard, and facilities and appurtenances, to be used by the Long Island Company hereunder, such additions, betterments and improvements as may be [fol. 98i-17] mutually determined between the parties hereto, except that the Pennsylvania Company may make, at any time, without the approval of the said Long Island Company such additions, betterments and improvements as in the judgment of the Directors of the Pennsylvania Company may be required by Federal, State or Municipal enactments or regulations, and also such as may in their judgment be necessary for the protection of the railroad and property covered by this agreement.

Third. For the purpose of defining the railroad facilities and appurtenances of the Pennsylvania Company to be used by the Long Island Company, and for the keeping of proper accounts for the business handled thereover and thereon by the respective parties hereto, said railroad, facilities and appurtenances shall be divided into the following sections, as shown on the map hereto attached and made a part hereof, and the value as of July 1st, 1928, agreed upon for each of said sections for the purposes only of this agreement in determining the rental to be paid, as hereinafter provided, shall be as follows:

1. Pennsylvania Station, Borough of Manhattan, City of New York, building above the track level and one-half the service plant	$15,000,000.00
2. Pennsylvania Station and yard at and below the track level between Tenth and Sixth Avenues	31,896,746.94
3. The approaching tunnels and tracks eastward from Sixth Avenue to Harold Avenue in the Borough of Queens	32,605,521.38
4. Sunnyside Yard and adjacent facilities in the Borough of Queens	8,623,170.90

Fourth. The Long Island Company covenants and agrees to use and avail itself of the rights hereby granted by the

Pennsylvania Company under and subject to the terms, conditions and stipulations of this agreement, and to pay as rental therefor in each and every month during the continuance of this agreement:

A. Such proportion of the several items in this article hereinafter mentioned as the number of cars and engines [fol. 98i-18] of the Long Island Company in and over Sections 2, 3 and 4 of the railroad described in Article Third hereof in each month shall bear to the total number of cars and engines therein and thereover during such month, each engine to be counted as three cars. Switching movements between the Pennsylvania Station and Sunnyside Yard with the exception of movements of engines and cars necessary for the arrangement or make-up of trains in said station or in said yard, but not passing from one section to another section, shall be included in computing the number of cars and engines in Sections 2 and 3 as set forth in Article Third hereof:

(a) One-twelfth of the annual interest at the rate of 5¾% per annum upon the valuation of Sections 2, 3 and 4 as set forth in Article Third hereof.

(b) One-twelfth of the annual interest at the rate of 5¾% per annum on the cost of additions, extensions, improvements and betterments which may from time to time be made after July 1st, 1928, to said railroad, station, yards and their facilities and appurtenances. For the purpose of this agreement all additions, extensions, improvements and betterments which may be made to the Pennsylvania Station building, yards, facilities and appurtenances between Sixth Avenue and Tenth Avenue shall be included in Section 2 as set forth in Article Third hereof.

(c) The cost and expense of operation, maintenance and renewals of those parts of said railroad, yards and their facilities and appurtenances described in Article Third hereof as Sections 2, 3 and 4 and of the additions, extensions, improvements and betterments thereto; taxes, cost of insurance and cost of lighting tracks and track crossings, watchmen and any other expenditure imposed by state, federal and municipal enactments or regulations to be included in maintenance and operation.

The insurance designated and specified in paragraph (c) above, shall not include any charge for the insurance of rolling stock against fire, but the latter must be borne and paid for by the Company owning such rolling stock or using the same in its service.

B. The party of the second part shall not be called upon to pay any part of the interest upon the valuation of Sec- [fol. 98i-19] tion 1, as set forth in Article Third hereof or of the taxes levied thereon. The party of the second part shall pay in each and every month 1/5 of the cost and expense of operation, maintenance and renewals of the station building and its facilities and appurtenances as described in Article Third hereof as Section 1. For the purpose of this agreement the expenses of operation, maintenance and renewals of said Section 1 shall be deemed to be the charges to the accounts station and office buildings, station employees and station supplies and expenses, as described in the classification of operating revenues and operating expenses of steam roads prescribed by the Interstate Commerce Commission. Taxes in said Section 1 shall be deemed to be the taxes levied by the City of New York on the assessed valuation of the station building, and one-half the taxes on the assessed valuation of the service plant. Inasmuch as The Long Island Railroad Company is not charged with the interest and taxes of the station building described as said Section 1 as hereinabove recited, it shall not be credited with the receipts from any station privileges, rents or concessions in the said station.

Fifth. All engines and cars shall be propelled and operated by electricity and in such system and manner as the Pennsylvania Company shall approve. The Pennsylvania Company covenants and agrees to furnish the necessary distributing system and supply the current from its power house to contact shoes on the equipment of the Long Island Company,—the said distributing system to embrace the necessary transmission lines, substations, storage batteries, working conductors and appurtenances thereof,—proper and necessary to enable the Long Island Company to move its trains on the portion of the said railroad of the Pennsylvania Company over which it is hereby granted trackage rights, and in said Pennsylvania Station and Sunnyside Yard, and for the supply of such current, and the distrib-

uting system and service connected therewith, the Long Island Company shall, and hereby covenants and agrees to, pay as rental therefor, in each and every month during the continuance of this agreement, to the Pennsylvania Company, such proportion of the several items in this Article hereinafter mentioned as the number of its cars and engines thereon, therein and thereover in each month shall bear to [fol. 98i-20] the total number of cars and engines thereon, therein and thereover during such month—each engine to be counted as three cars. Switching movements between the Pennsylvania Station and Sunnyside Yard, with the exception of movements of engines and cars necessary for the arrangement or make-up of trains in said station or in said yard but not passing from one section to another section, shall be included in computing the number of cars and engines in Sections 2 and 3 as described in Article Third hereof:

(a) One-twelfth of the annual interest, at the rate of 5¾% per annum on $10,356,032.03, being the value as of July 1st, 1928, agreed upon for the purposes only of this agreement in determining the rental to be paid of such distributing system and of all its ramifications and appurtenances, including the power house.

(b) One-twelfth of the annual interest, at the rate of 5¾% per annum, on the agreed cost of all additions, extensions, improvements and betterments which may, from time to time, after July 1st, 1928, be made to said distributing system and to all its ramifications and appurtenances, including the power house.

(c) That proportion of the operating expenses, including taxes, rents and easements, insurance, replacements and depreciation, and expenditures imposed by Federal, State or Municipal enactments or regulations, incurred by the Pennsylvania Company in generating and transmitting the electric current to contact shoes on the equipment of the Long Island Company; less receipts from current furnished to the Long Island Company for purposes other than handling its trains over the portion of the said railroad and in the said Pennsylvania Station and Sunnyside Yard, and similar receipts from current that may be furnished to other parties for purposes other than the propulsion of trains.

Sixth. At the end of the period of five years from and after the date this agreement takes effect, and at the end of any succeeding period of five years during the term hereof, either party hereto may, by giving not less than sixty days' [fol. 98i-21] previous notice in writing to the other party, seek a modification in the rate of interest rentals or in the bases upon which such interest rentals are computed, and in the event the parties are unable to agree in respect of any such proposed modification the question shall be submitted to arbitrators in the manner hereinafter provided for in Article Twelfth hereof, and the decision of the arbitrators or a majority of them shall be final and conclusive and binding upon the parties hereto.

Seventh. The bills against the Long Island Company for the rental and expenses prescribed by Articles Fourth and Fifth shall be rendered not later than the twentieth day of each month for the business of the preceding month, and payment thereof, without abatement, shall be made not later than the last day of each calendar month in which the bill is rendered. If any question or dispute shall arise as to any such bills, either Company shall have the right to examine the books and records of the other to vertify the settlement required to be made thereunder, but such dispute shall not delay the payment of bills as rendered, and any adjustment necessary by reason thereof shall be made in the accounts of subsequent months.

Eighth. If the Long Island Company, its successors or assigns, shall make default in whole or in part, in any payment prescribed and required by this agreement for the space of ninety days, or shall make default in the performance of any covenant or obligation herein contained or hereby imposed upon it for the space of ninety days after the service upon it of written notice of such default, then and in either such case, at the option of the Pennsylvania Company, all rights and privileges conferred by this agreement on the Long Island Company shall cease, terminate and be absolutely extinguished; provided, however, that such termination shall not affect the right of said Pennsylvania Company to enforce payment, by legal process, of money then due and unpaid by it, with interest upon all

deferred or delayed payments at the rate of five and three-quarters per centum (5¾%) per annum.

Ninth. The Pennsylvania Company shall provide for the movement over said portion of the railroad of such trains [fol. 98i-22] as the Long Island Company shall desire to move under this agreement and as nearly in accordance with the wishes of the Long Island Company as the same can be done without unreasonable interfering with its own trains of the same class, and shall, if necessary, place such trains of the Long Island Company upon its schedules, and in arranging schedules the Pennsylvania Company shall not discriminate against the trains of the Long Island Company, but shall give them equal rights with its own trains of the same class.

The trains, engines and employes of the Long Island Company, while upon the railroad of the Pennsylvania Company shall be subject to the regulations and orders of the Superintendent or other proper officer of that Company; and to secure uniformity in time, rules and signals, the Long Island Company agrees to adopt and use on said line of railroad the standard time, train rules and signals that may be in use from time to time by the Pennsylvania Company.

Tenth. The trackage rights over, and the use of said railroad, Pennsylvania Station and Sunnyside Yard, and the facilities and appurtenances thereof, hereby granted to the Long Island Company, are so granted with the understanding and upon the express condition that the Long Island Company shall assume all risks and liabilities for injury, loss or damage to its own trains, engines, cars and property in its charge, its passengers and employes, and also to all other persons and property, including the Pennsylvania Company, injured or damaged by, about, or incident to the operation of its trains, business or traffic from any cause whatsoever, and said Long Island Company hereby expressly covenants and agrees to protect, indemnify and save harmless the Pennsylvania Company against any and all loss, claims or demands in consequence of, or growing out of, such injury, loss or damage, however arising or occurring.

Where, however, loss or damage to their property is sustained by the parties hereto through their joint negligence,

then the Pennsylvania Company and the Long Island Company, respectively, shall bear their own loss, but loss or damage sustained by third persons—other than passengers and employes of the Long Island Company, and the persons and property described and defined in the preceding paragraphs of this Article—by such joint negligence shall be borne equally by the Pennsylvania Company and the Long [fol. 98i-23] Island Company. If any other claims, loss of damage arise, the same shall be considered and charged as part of the cost of maintenance and operation and included in the monthly accounts thereof and apportioned between the parties hereto as provided in Articles Fourth and Fifth with respect to expenses of maintenance and operation.

Superintendents, managers, agents, telegraph operators, train dispatchers, section foremen, or laborers, watchmen, switchmen, or any other persons subordinate to the President employed in, or charged with, the maintenance or care of or operation of the property aforesaid shall in respect to the liability of the parties using said railroad, Pennsylvania Station and Sunnyside Yard, facilities and appurtenances, to each other or to third persons, growing out of the fault or neglect of such officers, agents, or employes, be deemed and held to be the sole servants of that party to, or upon or in connection with, whose trains, business, traffic, or property any loss or damage may have occurred. Any employe below the rank of Superintendent of either of the parties to this agreement, shall at any time be removed from service, on, or in connection with, the railroad and property mentioned herein, upon complaint, in writing, addressed to the General Manager of the party employing the individual complained of by the General Manager of the other party; but such removal shall not prevent the employment elsewhere of the individual so removed.

Eleventh. The Long Island Company agrees that it will not use the said railroad, Pennsylvania Station, Sunnyside Yard and their facilities and appurtenances for the accommodation of any passenger, baggage, mail, express, or other traffic handled in passenger trains, which, or in such manner as may injuriously affect the interests of the Pennsylvania Company; nor will it at any time sell, assign or in any manner transfer or underlet all or any part of the rights and privileges by this agreement secured to it, with-

out the consent in writing of the said Pennsylvania Company; it being understood that the Long Island Company shall not by any practice or device use, or permit others to use, the said railroad, Pennsylvania Station, Sunnyside Yard, and the facilities and appurtenances of the Pennsylvania Company, under any conditions, whether resulting [fol. 98i-24] from consolidations, transfers of ownership, construction of new lines or extension of existing lines or otherwise, if such conditions have the effect of violating the provisions or intent of this Article.

In the event that in the judgment of the Pennsylvania Company, the Long Island Company shall at any time violate the intent or any of the provisions of this Article, such violation, upon notice from said Pennsylvania Company, shall be immediately discontinued, and if continued or controverted, the question shall be submitted for arbitration in the manner hereinafter in this agreement provided, and the judgment of the arbitrators in respect to the practice complained of shall be considered to have the effect of, and shall be enforceable as a specific covenant of this agreement.

Twelfth. In case of any difference of dispute arising under this agreement, the parties hereto agree to submit the same to two arbitrators, one of whom shall be appointed by the Pennsylvania Company and the other by the Long Island Company, and if these arbitrators cannot agree they shall select a third disinterested and competent person, and their decision, or that of a majority of them, shall be final and conclusive between the parties hereto. In case either of the said Companies shall fail to appoint an arbitrator as aforesaid, for the period of twenty (20) days after written notice given by the other Company to make such appointment, then and in that event the arbitrator appointed by the Company not in default shall appoint an arbitrator of like experience and skill for the defaulting Company, and the said two arbitrators so appointed shall select a third arbitrator, and the three so chosen shall hear and decide such differences, and their decision, or that of a majority of them, shall be final and conclusive upon the parties to this agreement.

Thirteenth. Subject to the approval of the Interstate Commerce Commission, the rights and privileges hereby granted to the Long Island Company by the Pennsylvania

Company shall be effective and exercisable as of the first day of January, 1931, and shall continue in full force and effect for the term of twenty (20) years from said date, and thereafter from year to year unless terminated either at the [fols. 98i-25 & 26] end of said twenty (20) year period or at the end of any subsequent year by six months' prior notice in writing by either the Long Island Company or the Pennsylvania Company to the other, when each and every right and privilege conferred under this agreement shall accordingly cease and terminate.

Any agreement or arrangement heretofore existing providing for the use by the Long Island Company of any of the tracks, station, yards, facilities and appurtenances covered by this agreement shall be in all things superseded by this agreement as of January 1st, 1931.

In witness whereof, the said parties have caused their respective corporate seals, duly attested, to be hereunto affixed the day and year hereinabove written.

The Pennsylvania Railroad Company, Lessee, by A. J. County, Vice-President. Attest: J. Taney Willcox, Secretary. (Seal.) The Long Island Railroad Company, by G. Le Boutellier, Vice-President. Attest: Eugene Wright, Asst. Secretary. (Seal.)

[fol. 98i-27] PETITIONERS' EXHIBIT B

The Pennsylvania Railroad Company

Office of the Secretary, General Office, Philadelphia

I hereby certify that the following is a true and correct copy, from the minutes, of action taken at a meeting of the Board of Directors of The Pennsylvania Railroad Company, held at the General Office of the Company, in the city of Philadelphia, on 17th December, 1930.

Resolved that the Board approves and authorizes the execution of an agreement, substantially in the form this day submitted and considered, between The Pennsylvania Railroad Company, Lessee of the Pennsylvania Tunnel and Terminal Railroad Company, and The Long Island Rail-

road Company, granting the last named Company trackage rights into, and the use of, Pennsylvania Station, New York City, and Sunnyside Yard, Long Island, for twenty years from 1st January, 1931, at a rental equal to the proportion of interest at the rate of 5¾% per annum on the valuation of the facilities used, (the station building above the track level to be excluded in the interest calculation, and one-fifth of the operating expenses applicable to that section to be charged to The Long Island Railroad Company), and of operating expenses and taxes, calculated on a car and engine basis.

Resolved that W. W. Atterbury, President, or A. J. County, Vice-President in charge of Finance and Corporate Relations, is authorized and directed to sign, verify and file, on behalf of this Company, an application to the Interstate Commerce Commission, for approval of the said agreement.

Attest:

J. Taney Willcox, Secretary. (Seal.)

[fol. 98i-28] PETITIONERS' EXHIBIT C

The Long Island Railroad Company

Office of the Secretary, Pennsylvania Station, New York, N. Y.

December 20th, 1930.

I hereby certify that the following is a true and correct copy, from the Minutes, of action taken at a stated meeting of the Board of Directors of The Long Island Railroad Company, held on December 3rd, 1930:

Resolved, That the proposed agreement this day presented to the Board and filed between this Company and the Pennsylvania Railroad Company for trackage rights over the Pennsylvania Tunnel and Terminal Railroad from Sunnyside Yard, Long Island, to and into the Pennsylvania Station, New York City, and the use of such station and yard upon the terms and conditions therein recited is hereby approved and the proper officer be authorized to

execute the same and take all further steps necessary in connection therewith.

And further resolved, That W. W. Atterbury, President, or G. LeBoutillier, Vice-President, is authorized to make, execute and file applications with the Interstate Commerce Commission to secure the approval of said agreement.

Attest:

(Signed) Eugene Wright, Assistant Secretary.

(Seal.)

[fol. 98j] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

Long Island Railroad Company Trackage

ORDER REOPENING PROCEEDING—Jan. 10, 1931

Upon further consideration of the record in the above-entitled proceeding and of the joint petition of the Pennsylvania Railroad Company and the Long Island Railroad Company submitting a modified contract and requesting that a certificate of public convenience and necessity be issued:

It is ordered, That this proceeding be, and it is hereby, reopened and assigned for further hearing at a time and place to be fixed.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[fols. 98k & 98k-352] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

Application of THE PENNSYLVANIA RAILROAD COMPANY, Lessee of the Pennsylvania Tunnel and Terminal Railroad, and THE LONG ISLAND RAILROAD COMPANY, under Paragraph (18) of Section 1 of the Interstate Commerce Act, for a Certificate of Public Convenience and Necessity Authorizing the Latter Company to Operate, under Trackage Rights, Over That Portion of the Pennsylvania Tunnel and Terminal Railroad from Near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, to Pennsylvania Station, Borough of Manhattan, City and State of New York, Including the Use of said Yard and Station and the Facilities and Appurtenances Thereof, and for an Order under Paragraph (4) of Section 3 of said Act, Requiring the Use of said Tracks and Terminal Facilities by the Long Island Railroad Company on Terms and for Compensation Agreed Upon by the Pennsylvania Railroad Company and the Long Island Railroad Company

Statement of Evidence

Before Thomas F. Sullivan, Examiner

New York City,
March 23, 1931.—10 a. m.

Met pursuant to notice.

Appearances:

Alfred A. Gardner, 418 Pennsylvania Station, New York, N. Y., appearing for Applicants.

George H. Stover, 270 Madison Avenue, New York, N. Y., [fols. 98k-353 & 354] appearing for the Transit Commission, State of New York.

Arthur J. W. Hilly, Corporation Counsel, (By Vincent Victory, Assistant Corporation Counsel), Municipal Building, New York, N. Y., appearing for the City of New York.

Maurice Hotchner, 225 West 34th Street, New York, N. Y., appearing for Association of Long Island Commuters, Inc.

Howard G. Wilson, Lynbrook, L. I., N. Y., appearing for Village of Lynbrook, L. I., N. Y., and for Nassau County Village Officials Association.

W. F. Walternath, 25 Raymond Avenue, Rockville Centre, L. I., N. Y., appearing for Nassau County Civic Federation.

[fol. 98k-355] Proceedings

Colloquy

Exam. Sullivan: Are you ready, gentlemen? This is the time and place assigned by the Commission for further hearing Finance Docket No. 7308, joint application of the Pennsylvania Railroad Company and the Long Island Railroad Company under Paragraph 18 of Section 1 of the Interstate Commerce Act. Who appears for the applicants?

Mr. Gardner: Alfred A. Gardner and D. P. Williams.

Exam. Sullivan: And for the interveners?

Mr. Stover: George H. Stover, counsel to the Transit Commission, representing the intervener Transit Commission of the State of New York.

Mr. Victory: Arthur J. W. Hilly, Corporation Counsel, representing the City of New York and Vincent Victory, Assistany Corporation Counsel.

Mr. Hotchner: The Association of Long Island Commuters, by Maurice Hotchner, its general counsel.

Mr. Wilson: Howard G. Wilson, representing the Village of Lynbrook.

Exam. Sullivan: Any further appearances?

Mr. Walternath: I do not know whether we are butting into this or not. It is the first I have heard of the hearing and I represent the Nassau County Civic Federation, and I was informed by our corresponding secretary of this hearing. We are here for information.

Exam. Sullivan: I take it you have not intervened in this [fol. 98k-356] proceeding heretofore?

Mr. Walternath: Not at all.

Exam. Sullivan: Have you an intervening petition prepared?

Mr. Walternath: We have not. We are just listening in.

Exam. Sullivan: Are you an attorney?

Mr. Walternath: No, sir. We are interested, of course, in anything pertaining to The Long Island Railroad, but I am not officially a representative.

Exam. Sullivan: Are you an officer of the Association?

Mr. Walternath: I am, and also Chairman of the Transportation Committee, so that we are naturally interested. Pardon, me, but we did get in touch with the Public Service Commission over the 'phone two weeks ago and asked for information concerning this meeting. We have not received anything.

Exam. Sullivan: Have you been admitted to practice before the Commission?

Mr. Walternath: I have appeared before the Commission a year ago at the hearing on transit facilities.

Exam. Sullivan: But have you been registered as a practitioner before the Commission?

Mr. Walternath: No, sir.

Exam. Sullivan: You might enter your appearance here, and give the reporter your name and address and the organization you represent, and I will suggest that you write the Secretary of the Commission asking him for the necessary forms permitting you to practice, and represent [fol. 98k-357] your Association before it in any proceeding. You may be considered as now having entered an appearance here. You may also fill out one of the reporter's appearance forms, if you will.

Mr. Victory: The City of New York took the position that it was not necessary to make a formal petition to intervene here as we were in the other cases.

Exam. Sullivan: Not at this stage, it is not necessary. This is merely a further hearing in the same old proceeding. I merely wanted to get the appearances in here over again to make sure that there were no differences in the appearances.

Mr. Hotchner: On that point I wrote the Commission several weeks ago and asked them whether it would be necessary to do anything further and they merely replied that I would get notice of the adjourned date, and so I assumed the same as Mr. Victory, there would be no need for formal application and this was merely another hearing in the old case.

Exam. Sullivan: This is merely a further hearing in the old case. The old record remains intact and is available for use in this proceeding, of course.

It will be understood, gentlemen, that the petition of the *petition of the* applicants in this proceeding will be considered as part of the record, subject of course, to the right of cross-examination by any party of record, as to any point set out therein. You may proceed, Mr. Gardner.

Mr. Gardner: And in that connection it might be con- [fol. 98k-358] venient to give it an exhibit number by reference which will be consecutive with the other exhibits, and the exhibits which are to come. The last exhibit was No. 40, put in evidence at page 281 of the minutes.

Exam. Sullivan: The numbers will go right along consecutively.

Mr. Gardner: And this petition can be considered by reference as Exhibit No. 41.

Exam. Sullivan: The petition will not be given an exhibit number, but it will be considered in the nature of a pleading in the case, the same as the application and the return to Questionnaire.

Mr. Gardner: I do not press it. It was only for convenience.

Exam. Sullivan: We cannot designate it as an exhibit, because it is already in the record in the nature of a pleading.

Mr. Gardner: I will withdraw my suggestion.

Exam. Sullivan: All reference to the petition may be made by designating it as the petition.

Mr. Gardner: It is part of the record, undoubtedly.

Exam. Sullivan: Yes.

Mr. Gardner: I will assume that your Honor has glanced at the petition and will not undertake a detailed restatement of what it contains.

Exam. Sullivan: No. I presume that copies of this peti-[fol. 98k-359] tion have been served on all parties of the record.

Mr. Gardner: It was filed and served on all parties of record.

Exam. Sullivan: Then it will not be necessary to put in the detail in the petition through testimony.

Mr. Gardner: No, and I will omit from oral presentation in the first instance a repetition of what is in that petition, but I would like to present evidence as to what the effect of the proposed new contract would be and what it would have been if it had been in effect for three years, and I will call Mr. Rawson and by him I also will explain how the maintenance and operating charges are provided for in the new agreement; that is to say, the basis which has been adopted in arriving at the one-fifth—four-fifths apportionment set forth in the petition. Mr. Rawson.

Hobart Rawson, recalled as a witness, having been previously sworn, testified as follows:

Direct examination.

By Mr. Gardner:

Q. You have been sworn and examined in this proceeding before?

A. I have.

Q. And you have stated your qualifications and experience and experience and familiarity with this particular controversy and the matters therein in question?

A. Yes.

[fol. 98k-360] Q. Have you prepared statements showing what the effect would have been upon payments under this agreement for a period of three years last past?

A. Yes. I have prepared first a statement showing the payments made by The Long Island Railroad Company to

The Pennsylvania Railroad Company under the terms of the agreement under which we are now working, which has expired long ago but which we are still working under, for the years 1928, 1929 and 1930.

Mr. Gardner: I will offer that in evidence. I think it will be exhibit 41.

Exam. Sullivan: The statement will be received as Exhibit No. 41.

Mr. Gardner: I may say that I sent a copy of this exhibit to Mr. Stover pursuant to a request from him several days ago. I will call the stenographer's attention to a stamp on the corner of each of these exhibits which has the case number and everything ready for him to simply put the exhibit number in as they are presented.

(The statement was received in evidence and marked "Applicants' exhibit 41, witness Rawson." It is forwarded herewith.)

Q. Have you prepared, Mr. Rawson, a statement showing what the payments would have been if the present proposed agreement had been in effect?

A. Yes, I have made a statement for the same three [fol. 98k-361] years, 1928, 1929 and 1930 in which I have made an estimate of the payments which would have been made by The Long Island Railroad Company to The Pennsylvania Railroad Company if the proposed agreement dated December 23, 1930, had been in force during those three years.

Mr. Gardner: I will offer that in evidence.

Exam. Sullivan: It will be received as Exhibit No. 43.

(The statement was received in evidence and marked "Applicants' exhibit 42, witness Rawson." It is forwarded herewith.)

By Mr. Gardner:

Q. Have you prepared statements showing the basis and underlying data for the apportionment of maintenance and operating charges with respect to the station building?

A. Yes. I have prepared statements for the months of March, November and December, 1930, which are an estimate of the distribution of wages of certain employees at

the Pennsylvania Station between The Long Island Railroad and The Pennsylvania Railroad including with The Pennsylvania Railroad other railroads except The Long Island Railroad on the basis of the service actually performed for each railroad. There are three sheets of this, one for each of the months.

Mr. Gardner: I offer them in evidence to be numbered with separate numbers.

Exam. Sullivan: The statement for March will be re-
[fol. 98k-362] ceived as Exhibit No. 43.

(The statement was received in evidence and marked "Applicants' exhibit 43, witness Rawson." It is forwarded herewith.)

Exam. Sullivan: The statement for November will be received as exhibit No. 44.

(The statement was received in evidence and marked "Applicants' exhibit 44, witness Rawson." It is forwarded herewith.)

Exam. Sullivan: The statement for December will be received as Exhibit No. 45.

(The statement was received in evidence and marked "Applicants' exhibit 45, witness Rawson." It is forwarded herewith.)

Mr. Victory: I assume, Mr. Examiner, that these have been received subject to correction?

Exam. Sullivan: Of course.

Mr. Victory: And subject to a motion to strike out if we determine that they have been built up on any erroneous basis?

Exam. Sullivan: Certainly.

By Mr. Gardner:

Q. Have you prepared a statement, Mr. Rawson, showing the number of passengers entering and departing at the Pennsylvania Station during the year 1930?

A. Yes, I have. It shows the passengers separated between the four railroads using the station, that is, The Long
[fol. 98k-363] Island Railroad, the Lehigh Valley Railroad, the New York, New Haven and Hartford Railroad and The Pennsylvania Railroad.

Mr. Gardner: I will offer that in evidence.

Exam. Sullivan: The statement will be received as Exhibit No. 46.

(The statement was received in evidence and marked "Applicants' exhibit 46, witness Rawson." It is forwarded herewith.)

By Mr. Gardner:

Q. Referring to the exhibits which have been put in showing the basis of apportionment of the operating and maintenance charges with respect to the station building, will you please tell me how that data was collected, was it done under your supervision exclusively?

A. Yes. The data shown here of the distribution of wages to certain employees at the Pennsylvania Station was arrived at by giving to the supervisory men in the four different departments into which the station operation is divided, that is, the police, the station master, the baggage master and the ticket agent, sitting down with them and going over their payrolls, and from their intimate knowledge of the operation of the station, determining how much of the service of the different employees was for The Long Island Railroad and how much for The Pennsylvania Railroad and the other railroads, which for the purpose of this agreement was *have* included together, that is, The Pennsylvania and the other railroads.

[fol. 98k-364] This was done without asking them or telling them the reason why we did it. We just simply said we wanted to get the facts as to how much work these men were doing for the different railroads, as nearly as they could determine. We took it for three months, March in the spring time, November and December in the fall. Unfortunately, we let the summer months pass when The Long Island Railroad's business is the heaviest as we were discussing the agreement very much at that time. You will note on these three exhibits that the amounts——

Q. What are the numbers of them?

A. 43, 44 and 45—that the amount shown as charged against The Long Island Railroad on the ticket agent's payroll is the same, namely, $6,400. The reason for that is that The Long Island for three or four years has had their own ticket selling force in the Pennsylvania Station.

There was considerable complaint three or four years ago as to the service that The Long Island was receiving in ticket offices of the Pennsylvania Station, and it was decided at that time that it would be better to put those men on The Long Island Railroad, divorce them entirely from the men in the Pennsylvania ticket offices.

At that time the services of these men were costing The Pennsylvania $6,400 a month and The Pennsylvania thereupon agreed to pay The Long Island $6,400 a month for the services of the ticket men at the ticket office.

[fol. 98k-365] Actually at the present time The Long Island is paying out something like between seven and eight thousand dollars a month for the services of these ticket offices because they have increased the force since that time, but they are being reimbursed to the extent of $6,400 which is charged by The Pennsylvania to the station account.

For that reason in making this distribution we have used that sum as the amount which is being charged to the station account.

Q. You have no reason to believe that the people who collected this data knew what you were trying to collect it for, or had any bias one way or the other in giving you the information?

A. No, I do not think so, no.

Mr. Gardner: That I think completes the proof that I have to offer.

Exam. Sullivan: Are you ready, Mr. Stover?

Mr. Stover: Yes.

Exam. Sullivan: You may go ahead.

Cross-examination.

By Mr. Stover:

Q. Mr. Rawson, exhibits 43, 44 and 45, present an estimated distribution of wages of certain employees of the Pennsylvania station between The Pennsylvania and The Long Island, is that correct?

A. Yes, that is correct.

Q. Is this distribution supposed to be made on the basis [fol. 98k-366] of service performed by each company?

A. Yes, that is it as nearly as we could determine it.

Q. And these three exhibits, as appear on their face, cover the months of November, December and March of 1930?

A. Yes.

Q. Are these supposed to be representative months for that year?

A. They are fairly representative. As I say, we took them in March, we were very active in considering this, and then in November and December we were preparing this agreement, and the work had to be done currently to be done with any degree of accuracy at all.

In other words, it was almost impossible to go back and get in November and December, say the months of July and August, with the degree of accuracy with which we wished to do it.

As a matter of fact, I find that they are fairly representative in the proportion of passengers handled. For the year 1930, The Long Island passengers constituted 82.27 per cent of the total. In March, they were 81.28 per cent; in November, 81.95 per cent and in December 83 per cent. So that I think the three months together can be taken as fairly typical.

Q. Were they taken at random, Mr. Rawson?

A. Yes, I would say simply it was in March, 1930, we were [fol. 98k-367] considering some things in connection with this agreement, and that is how I happened to do it at that time, and in November and December we were preparing the latest agreement.

Q. You say that they were taken at random, but that they turned out to be representative months?

A. Yes, that is it.

Q. Did the number of passengers enter into the basis of allocation?

A. No, the number of passengers does not enter into the basis of allocation. It is simply the service performed. The number of passengers I think had some connection with the amount of service performed by the station employees.

Q. Did I understand you to say that the number of passengers was greater in the summer months?

A. The percentage of Long Island passengers is greater in the summer months than in the winter months because The Long Island has a heavy summer business.

Q. The wages of these exhibits as given are subdivided among four classes of employees. Is the actual payroll for each class given for each month?

A. The total payroll, the police department payroll is $5,752. That is the amount of payroll which is charged to the account, station employees, account No. 373. In other words, there may be some other accounts which some of the policemen's salaries are chargeable that do not come into the station employees' account.

[fol. 98k-368] For instance, some of it is billed against the taxicab company down there. The same way with the station master's payroll, and the baggage master's payroll. In case of the ticket agent's payroll, as I explained before, The Pennsylvania part is the actual payroll. The Long Island part is the amount which The Pennsylvania pays to The Long Island for the services of The Long Island ticket force in the Pennsylvania Station. The actual payroll is slightly greater.

Q. But the totals are taken directly from records?

A. Yes.

Q. But the assignments between The Pennsylvania and The Long Island represent allocated figures?

A. Yes, they are allocated, certain men—say this man works entirely in The Long Island portion of the station and for the benefit of The Long Island Railroad. Another man works in The Pennsylvania part and for the benefit of The Pennsylvania Railroad. Another man, he works one-third of his time in one part and two-thirds of his time in the other, and that is the way the thing was arrived at.

Q. In determining that allocation, did you rely on what these respective masters told you or did you use your own judgment?

A. I relied on what they told me.

Mr. Stover: It seems to me, Mr. Examiner, that technically this method of proof is defective. We have here nothing but hearsay evidence as to this point.

Exam. Sullivan: Do you mean as far as exhibits?

[fol. 98k-369] Mr. Stover: Yes, he says that the apportionment between the companies is based on an allocation, and that that allocation is based on what these different masters, the station master, the baggage master and so forth, told him. I do not wish to impede the hearing at this

time, but I would like to reserve that point for a motion for later on.

Exam. Sullivan: You may reserve it and we will see how the hearing develops.

By Mr. Stover:

Q. Take the police department payroll, just what duties are included in that group?

A. They are the patrolmen around the station building. There are certain uniformed patrolmen that the Railroad has around the station. They are at the entrance and they circulate through the waiting rooms, the concourse and they are men stationed during the rush hours down on The Long Island platforms to keep the crowds moving in boarding the trains.

Q. What do they do?

A. They are there to preserve order largely.

Q. Do they perform any of the functions that are performed by I. R. T. platform men?

A. The ones down on the platforms do to a certain extent, yes.

Q. How are the wages of these groups divided between the two companies?

A. I have here an item, the men in The Long Island waiting room, that is, the waiting room and concourse, and that is where they patrol, and they were charged to The [fol. 98k-370] Long Island. The men on the mail platform, almost all of them was The Pennsylvania. I see there is $41.00 Long Island, and $784 Pennsylvania. The main Pennsylvania waiting room and concourse, they are put against The Pennsylvania and also two men in the station in the arcade.

Then the supervisory men which they charge to joint, they were figured on the basis of one-third to The Long Island and two-thirds to The Pennsylvania.

Q. How did you get that apportionment?

A. They estimated that their work, about one-third was for the benefit of The Long Island and two-thirds for the benefit of The Pennsylvania.

Q. Do any of these police officers have absolutely definite assignments or are the assignments shifted?

A. The men have as a rule definite assignments. Of course, a man may be changed in a certain assignment from time to time, that is, the individual, but there are certain

definite assignments to the men in The Long Island waiting room and The Pennsylvania waiting room and the cab driveways.

Q. Do they not shift the assignment during different parts of the day to consider the rush hours and matters of that kind?

A. Not to any great extent, no. As I say, they have a man or a couple of men on The Long Island platforms during rush hours. They may be in the concourse during the balance of the day but they are pretty definitely assigned [fol. 98k-371] to The Long Island section of the station.

Q. Is anyone in this class exclusively assigned to The Long Island?

A. Yes, I would say there are three men who are exclusively assigned to The Long Island, $495 wages.

Q. With regard to the station master's payroll——

Exam. Sullivan: Just a moment.

By Exam. Sullivan:

Q. Do you know the total number of men comprising that police force?

A. I have not got the total number of men here now.

Q. I mean the average total.

A. $5700 is the total money and there are about 30 men.

By Mr. Stover:

Q. With regard to the station master's payroll, what different kinds of work are included in that group?

A. The station master has charge principally of the ticket examiners or gatemen and the ushers and attendants around the station, that is, the attendants in the toilet rooms and the ushers who are around the station to circulate around, you might say, to guide passengers and then at the train information bulletin, the train announcing bulletin and the men at the other information bureaus come under the ticket agent.

Q. How many men are there in this group as a whole?

A. I have not got just the exact number, but there are about 75 men.

Q. Are the red cap porters included in this group?

[fol. 98k-372] A. Only the head porter. The other porters are not paid anything.

Q. They rely on tips?

A. They rely on tips, yes.

Q. How is this allocation determined?

A. The ticket examiners have certain definite posts, that is, there are 14 ticket examiners who are regularly assigned to the work in The Long Island on The Long Island trains, and 12 in The Pennsylvania. The assistant station masters, there are four who are regularly in The Long Island and three in The Pennsylvania. Of course, the station master has charge of the arrival and dispatching of the trains from the station.

Q. Those that you have mentioned are all exclusively assigned?

A. They are all exclusively assigned. Then the balance are men who work part of the day in one part and part in the other. Their wages were assigned 50 per cent to The Pennsylvania and 50 per cent to The Long Island.

Q. What are the duties of those jointly employed?

A. Of course, there is the station master and the station master's office force. The head station porters, that is, the red caps, the head men are paid, and the ushers as I say, are the men that are at the bulletin board for the incoming trains and the men that operate the elevators between the train level and the exit concourse, and the men that are stationed in the concourse and waiting room to give infor-
[fol. 98k-373] mation to passengers.

Q. How many of the red caps are paid?

A. There are ten of those.

Q. Are any of those employed in The Long Island concourse?

A. They have no regular posts at all. They go where they can pick up some business and these men are just the ones that have general charge of the balance.

Q. You, yourself, have made observation of the station?

A. Yes.

Q. Did you ever see many of them down in The Long Island concourse?

A. There is almost always three or half a dozen red caps around The Long Island concourse. In busy times there are more than that. There are always one or two at the platform on the arrival of each train.

Q. You are talking about the unpaid red caps?

A. I could not tell you offhand which are the ones that are paid and which are the ones that are unpaid. The head men are the only ones that are paid.

Q. You gave me the number of red caps, did you, the total number?

A. No, sir. I have not got that. There may be 100 or more.

Q. But a certain number are to be found down in The Long Island concourse?

[fol. 98k-374] A. Yes.

Q. The great proportion, however, are found in the upper levels near the street?

A. No, they usually congregate, I think, down at the exit concourse where they await and are assembled, and go down to meet the incoming trains.

Q. They make their money by assisting the passenger in carrying baggage?

A. Yes, both the incoming passengers and the outgoing passengers.

Q. The commuting traffic does not encumber with much baggage, does it?

A. No.

Q. But the class of passenger that comes with baggage is Pennsylvania?

A. Yes, largely so.

Q. And if the red cap is well advised he would station himself where there was the most probability of passengers?

A. That is true.

Q. That would be the Pennsylvania?

A. And it may be for that reason that those that are paid are more on The Long Island because they have not the chance of making so many tips.

Q. Mr. Rawson, is it not true that the ones that are paid merely direct the other red caps and do not carry baggage themselves?

[fol. 98k-375] A. I think they do carry baggage, too. They are more to circulate around and keep order and see that the others are on the job.

Q. In the station master's payroll there appears to be a total decrease of $1,000 a month from the March figures to the December and November figures. That is correct, is it not?

A. Yes.

Q. Perhaps nearer $2,000?

A. The March figure 14,820 and the November is 13,956, and December 13,838, just about $1,000.

Q. But with regard to the allocation in March I should say that about 60 per cent was assigned to The Pennsylvania while in December over 50 per cent was charged to The Long Island. Could you explain that change in proportion?

A. Without looking at these sheets in detail I would say that The Pennsylvania business has fallen off in the last year quite noticeably, the through passenger business. The Long Island business has not, but it has remained almost constant and in fact, there has been a slight increase in The Long Island passengers month by month over a year ago.

Railroads have made very strenuous efforts in the last few months to reduce their expenses. They could not reduce any of the men in the station master's organization of The Long Island part, but they had to reduce the men in The Pennsylvania. That is the reason why the reduction is all shown in the Pennsylvania part.

[fol. 98k-376] Q. With regard to the baggage master's payroll, how is the division made between the two companies?

A. The baggage master's payroll, we found that on The Long Island side, we are handling The Long Island baggage and mail, we had four assistant baggage agents, 32 baggage and mail handlers, and then five parcel room attendants.

On The Pennsylvania exclusively, we had three assistant baggage agents and 25 baggage and mail handlers. The balance are joint.

Q. How many would that be?

A. There are 427 and we divide their time on the basis of the number of pieces of baggage that were handled in the month of December, the number of pieces handled for The Long Island were 4,081. The total number of pieces handled for all railroads was 66,874 or 6.1 per cent for The Long Island. The wages for the balance of these men were divided on that ratio, that is, 6 per cent charged to The Long Island.

Q. That division between The Long Island and The Pennsylvania was made according to the number of pieces of baggage?

A. Yes, pieces of baggage.

Q. Irrespective of the size of the pieces of baggage?

A. Yes.

Q. Is it not probable that The Pennsylvania baggage would greatly exceed in size that handled by The Long Island?

A. I do not think so. The baggage that is handled are trunks, some hand baggage but as a matter of fact I think [fol. 98k-377] there is very little comparatively hand baggage handled through the baggage room. That is usually taken by the passenger into the train with him. I have no reason to think that the character of the baggage as to size is any different from one to the other.

Q. Have you any definite knowledge on that point?

A. No, I have not.

Q. It is your opinion?

A. Yes.

Mr. Gardner: People do not have specially small trunks to travel with on The Long Island.

The Witness: I do not think so.

By Mr. Stover:

Q. People that travel on The Pennsylvania, having come from long distances are much more likely to travel with trunks?

A. Oh, yes, that is true.

Q. And bigger trunks?

A. I do not know that they are bigger, no.

Q. How many of the baggage master's employees were employed exclusively for The Long Island?

A. I gave you that a few minutes ago.

Q. And I think you have already explained the ticket agent's payroll?

A. Yes.

Q. Where are the monthly commutation tickets generally [fol. 98k-378] purchased, at the Pennsylvania station or at the local station?

A. I do not know what the proportion is. All I know is that at the end of the month there are a good many special

men that are brought into the ticket office at the Pennsylvania station to sell commutation tickets. There are ten or a dozen windows that are devoted exclusively to the sale of commutation tickets.

Q. How many days near the end of the month?

A. For four or five days, maybe the last two or three days of the month and the first and second day of the beginning of the month.

Q. Would the family and other trip tickets be sold at the Pennsylvania station or at the local station?

A. I think both.

Q. Do you mean it is possible?

A. Yes. I know of no reason why as many are not sold at the Pennsylvania station as at the local station. Some people find it more convenient to get it at the Island and others at the Pennsylvania station.

Q. Long Island residents buying single trip or return trip tickets from their station to Manhattan would have to do it at the local station?

A. Yes.

Q. Have you any figures as to the volume of Long Island ticket sales at the Pennsylvania station?

[fol. 98k-379] A. No, I have not.

Q. According to exhibits 43, 44 and 45 it seems to appear that The Long Island ticket costs are only one quarter of The Pennsylvania ticket costs?

A. Yes.

Q. And according to the exhibit 46, The Long Island has over five times the number of Pennsylvania passengers in and out of the terminal?

A. Yes.

Q. Does not that illustrate how low unit costs result from mass handling of traffic?

A. It does with this particular item in the case of sales of a ticket, The Long Island passengers largely use the commutation and trip tickets. The Pennsylvania passengers almost all use single or at most round-trip tickets.

Q. The figures in exhibits 43, 44 and 45 are for only four groups of employees?

A. Yes.

Q. What is the aggregate monthly payroll for the entire Pennsylvania station?

A. About $130,000. The total for the year was $1,564,000, which is an average of approximately $130,000 a month.

Q. And what are the other principal classes of employees?

A. The other principal item is the station cleaners. That is done by contract with the Allied Cleaning Company. They are not carried on the Railroad payroll but the por-
[fol. 98k-380] tion of the cleaning force which is assigned to the station is charged to that account, station employees.

Q. What is the cost of that per month?

A. That runs in March $13,000, November $10,000 and December, $10,000. That makes up nearly all the balance.

Q. Is it possible to allocate any part of that cost exclusively to The Long Island?

A. It might be possible. I did not attempt to do it, though. That work is done by contract.

Q. Can you tell me the character of cleaning that is done by this group?

A. They do all of the cleaning in the station. They mop up the floors and wash the walls and the windows.

Q. Polish the brass work?

A. Yes. I do not know how much of that they do these days.

Q. The existing agreement was approved by the Transit Commission in 1925?

A. Yes.

Mr. Gardner: You mean the expired agreement.

By Mr. Stover:

Q. The agreement under which you are now operating?

A. Yes.

Q. And a few months before that the Transit Commission had disapproved another agreement which was submitted?

A. Yes.

Q. That agreement that was disapproved provided for
[fol. 98k-381] the apportionment of a wheelage basis of interest at the rate of 4 per cent on an investment which included the cost of the terminal building?

A. Yes, that is my recollection.

Q. That agreement would have apportioned all of the cost of the terminal zone on a wheelage basis?

A. Yes.

Q. And it would have included all operating expenses, taxes and interest on the entire investment?

A. Yes.

Q. And the City of New York and the Commuters Association objected to the wheelage basis as an unsound method of cost allocation?

A. That is my recollection, yes.

Q. And the Transit Commission objected to the inclusion of the terminal building in the investment cost?

A. Yes.

Q. They insisted on the exclusion from the joint facility account of all the operating expenses and maintenance of the station building as well as interest and taxes on investment?

Mr. Gardner: You have put in evidence the opinion in those Transit Commission cases. I submit that that ought to be the best evidence of what the Transit Commission did so far as that may be relevant to this controversy.

Exam. Sullivan: I take it that counsel is refreshing the [fol. 98k-382] recollection of the witness?

Mr. Gardner: Then I have no objection.

Mr. Stover: Mr. Gardner is correct in saying that this is a matter of record.

By Mr. Stover:

Q. And it was on that ground that the proposed agreement was disapproved in 1925?

A. Yes, that is my recollection.

Q. The companies then submitted another agreement which after amendment was approved by the Transit Commission?

A. Yes.

Q. And that agreement as originally submitted excluded $15,000,000 from the station zone investment but increased the interest rate from 4 per cent to 5 per cent. I am speaking now of the agreement which was submitted before it was amended?

A. Yes, that is right.

Q. And upon objection by the Transit Commission the interest rate was put back at 4 per cent?

A. Yes, on instructions by the Transit Commission I think it was.

Mr. Gardner: They forced us to do it. There is no doubt about that.

By Mr. Stover:

Q. And under these conditions, the wheelage basis was allowed by the Transit Commission?

A. Yes.

[fol. 98k-383] Q. They did not upset that?

A. No.

Q. The agreement now submitted to the Interstate Commerce Commission would put 20 per cent of all station expenses on The Long Island?

A. Operating and maintenance, yes.

Q. A comparison of exhibits 41 and 42 will show the increase in operating expenses due to this cause?

A. Yes.

Q. Let us take the Tenth Avenue zone where the station is located. In 1928 the operating expenses paid by The Long Island under the present agreement as shown on exhibit 41 amounted to $250,064. Under the proposed agreement shown by exhibit 42, they would have been $692,267?

A. Yes.

Q. That would have b*aa*n an increase of $442,203?

A. Yes.

Q. That represents 20 per cent of the station expenses for that year?

A. Yes, that is what it is, 20 per cent of the station expenses above the track level for the year 1928.

Q. An amount which is excluded under the present agreement but would be included under the proposed agreement?

A. Yes.

Q. Computed in the same way, for 1929, the increase in operating expenses would have been $485,314?

[fol. 98k-384] A. Yes.

Q. And for 1930, $408,519?

A. Yes.

Q. If you assumed that if 20 per cent of the total station expenses were regularly assigned to The Long Island, the

amount would represent closely an actual station cost due to Long Island operation?

A. Yes, that is the basis on which it worked.

Q. I asked if that was the basis of your assumption?

A. Yes.

Q. From Exhibit No. 42 it would appear that the total station expenses increased in 1929 over those of 1928, but in 1930 were below those of both 1928 and 1929?

A. Yes.

Q. What is the reason for that increase in 1929?

A. In 1929 there was a substantial increase in business both on the part of The Long Island and The Pennsylvania. Those were pretty flush times for the railroads and people were riding and there may have been some slight increase in wages, and I do not recall whether there was any in 1929 or not.

In 1930 on the other hand, The Long Island's business only increased very slightly and The Pennsylvania fell off materially and that resulted in a decrease in the station expenses. The railroad made every effort to reduce its expenses there.

Q. Which railroad would you say was responsible for the [fol. 98k-385] sharp increase in expenses in 1929?

A. I think it was both railroads. I do not think there was much difference between one and the other. The traffic increased on both railroads in 1929 as compared with 1928.

Q. And which company would you say was responsible for the sharp decline in 1930?

A. The decline in 1930 was almost entirely in The Pennsylvania.

Q. You think the increase in station expenses was due to both but that the decline was due solely to The Pennsylvania?

A. Practically yes.

Exam. Sullivan: We will take a short recess.

(Whereupon a short recess was taken.)

By Mr. Stover:

Q. Mr. Rawson, Exhibit No. 42 shows the car and engine movements in the station zone. Would it not appear from these figures that the total increased from 1928 to 1929 and from 1929 to 1930?

A. These are just The Long Island and the per cent which The Long Island are of the total.

Q. I have taken the trouble to compute the totals from the percentage and it appears to me that they have increased. Do you know whether that is true or not?

A. I have not made the computation and I do not recall. The Long Island as shown here, car and engine movement, has increased materially. I thought that The Pennsylvania had decreased slightly in 1930. It is readily computed.

Q. I was asking about the total of both.

[fol. 98k-386] A. Yes.

Mr. Gardner: Do I understand that you have taken the trouble to make the computations?

Mr. Stover: Yes.

Mr. Gardner: Perhaps if the witness were permitted to see your computation he might explain or correct you if you have made a mistake.

The Witness: That indicates that the total in car and engine movements in 1929 are slightly greater, but the increase over 1929 of The Long Island is slightly greater than The Pennsylvania.

By Mr. Stover:

Q. But the total movements increase each year?

A. Yes.

Q. And The Long Island increases each year?

A. Yes.

Q. But The Pennsylvania although increasing in 1929, declined in 1930?

A. Yes.

Q. If The Long Island movements had any appreciable part in causing the total amount of station expenses in the 1930 increase in its movements, it would have caused an increase in the station expenses for 1930?

A. I do not get that.

Q. Dr. Bauer tells me that I said 1930 for both years. I meant 1929 in the first instance and 1930 in the second [fol. 98k-387] instance.

Mr. Gardner: Might you state it now correctly? Will you repeat your exact question?

By Mr. Stover:

Q. If The Long Island movements had any appreciable part in causing the total amount of station expenses, the 1929 increase in its movements would have caused an increase in the station expenses?

A. Yes.

Q. The same would be true for 1930?

A. While the movements increased in 1930, the number of passengers carried remained just about the same. I think that these station expenses, that is, above the track level, are probably more a function of the number of passengers than of the number of car movements. They fluctuate more with the increase or decrease in passengers. Of course, you must remember too, that in 1930 every effort was made to reduce expenses, that is, wherever there was a service which appeared at all extravagant or which you might possibly get along without, that was cut out. In 1929 that was not so.

Q. In 1929 there was a rather sharp increase in Pennsylvania car movements?

A. Yes.

Q. And in the same year there was a rather sharp increase in station expenses?

A. Yes.

[fol. 98k-388] Q. In 1930 there was a decline in Pennsylvania car movements?

A. Yes.

Q. And it declined in expenses?

A. Yes.

Q. Would you not infer from that that it was the Pennsylvania car movements which increased the station expenses?

A. The Pennsylvania car and passenger movements, and as I say too, in 1930, there was the strongest effort to reduce expenses all along the line. In The Long Island part of it it was almost impossible to make any reduction because the travel was just about the same. In The Pennsylvania the travel fell off and it was possible to make the reduction without seriously affecting the service.

Q. Is not the volume of station expenses determined primarily by the needs and the prosperity of The Pennsylvania?

A. Not entirely, no.

Q. I asked primarily.

A. I think primarily, yes.

Q. In addition to putting 20 per cent on the operating expenses of the station on The Long Island, the proposed agreement would also increase the interest rate from 4 per cent to 5¾ per cent?

A. Yes.

Q. This increase in interest rate would have raised the charges to The Long Island?

[fol. 98k-389] A. Yes.

Q. And a comparison of exhibits 41 and 42 would show what the increase in The Long Island charge would have been?

A. Yes.

Q. In the station zone in 1928 it would have been $222,754?

A. The interest?

Q. The increase due to the change in the interest rate?

A. Yes.

Q. And in the Sixth Avenue zone or tunnel zone it would have been $342,088?

A. Yes.

Q. And in the Sunnyside Yard it would have been $14,134?

A. I did not quite check that figure off but it is approximate.

Q. It would have been a total of between five and six hundred thousand dollars?

A. Yes.

Q. And computed in the same way the aggregate interest increase for 1929 would have been, I make it, $572,959?

A. That looks about right, yes.

Q. And for 1930 I make it $593,272?

A. Yes.

Q. The interest payment under the present agreement is already over $1,300,000?

A. Yes.

Q. The greater increase in the interest from 1929 to [fol. 98k-390] 1930 would be due to the wheelage ratio?

A. Yes, due to the change of wheelage ratio.

Q. Where the Transit Commission has allowed the wheelage basis the rate of interest was 4 per cent?

A. The rate of interest in the agreement that was approved by the Transit Commission was 4 per cent, yes.

Q. When they approved that agreement in 1925 they allowed the companies to make it retroactive to 1923?

A. Yes.

Q. And the effect of that agreement then approved was to increase considerably the rental which The Long Island would have paid in 1923 under the earlier agreement?

A. Yes.

Q. Is it not true that under the existing agreement the charges to The Long Island have increased over $500,000 a year over the charges paid in 1923?

A. I think there was something of that order. I do not recall the exact amount now.

Q. Nearer $800,000?

A. They are all set forth in one of the exhibits. It was a substantial sum.

Q. Compared with this increase, whatever it may be, in the rental payments made by The Long Island since 1923, and the existing agreement, can you state what additional costs have been incurred in the terminal during this period [fol. 98k-391] due directly to Long Island operation?

A. The Long Island facilities have been materially expanded, at least once, I do not know but what twice going back to 1923.

Q. You are talking about capital charges?

A. Capital charges and expense of maintenance and operation, the increased facilities, waiting room, concourse facilities, for the primary benefit of The Long Island have increased, as well as the capital expenditures, that is, the waiting room space has increased, the concourse space, the number of tracks used by The Long Island has increased all of which has undoubtedly added to the expense of operation and maintenance.

Q. Could you tell us how much?

A. No, I do not know.

Q. Would it be possible to tell us how much?

A. I doubt it.

Q. Mr. Rawson, has the Interstate Commerce Commission ever regulated or attempted to regulate the rental paid by The Long Island to The Pennsylvania?

Mr. Gardner: I object to that. What has this witness got to do with saying what the Interstate Commerce Commission has done?

Mr. Stover: Does he know?

Mr. Gardner: He is apparently calling for a conclusion of law.

Mr. Stover: I am not calling for a conclusion of law at [fol. 98k-392] all. I am asking for a fact.

Mr. Gardner: The Transit Commission has been a party to every proceeding there ever has been brought. It is frivolous and irrelevant.

Mr. Stover: If your Honor please, the Transit Commission has not been a party to every proceeding brought. There was a rental agreement between the Tunnel Company and The Pennsylvania to which we were not a party.

Exam. Sullivan: Objection overruled. You may answer the question.

The Witness: Will you repeat it?

Mr. Stover: Read the question.

(Last question repeated as recorded.)

A. Not as far as I know.

Q. Has it ever attempted to enjoin the operation of The Long Island into The Pennsylvania station?

A. Not as far as I know.

Q. Ever threaten to do it?

A. No, not as far as I know.

Q. Did it urge or suggest the making of the prior application for a certificate which was refused a year ago?

A. I do not know at all. I do not know what their attitude toward that was.

Q. As far as you know it did not?

A. I say I really do not know whether they made any [fol. 98k-393] suggestion along that line or not.

Q. And you do not know whether it urged or suggested the making of this application?

A. No, I do not.

Mr. Gardner: Never urged anything as far as I know, and I think I would have known about it.

By Mr. Stover:

Q. In denying last year the application made, the report set forth certain reasons why the proposed agreement im-

posed unreasonable terms on The Long Island. Do you recall that?

A. Yes.

Q. And in making this agreement I assume there was an attempt made to meet the objections raised in that report?

A. Yes, that was one of the things we had in mind in preparing this agreement.

Q. That report disapproved the interest rate at 6 per cent and so you took off one quarter of 1 per cent on the interest rate to meet that?

A. Yes.

Q. And the report objected to the inclusion of the terminal building above the track level and so you excluded the sum of $15,000,000?

A. My recollection is that it did not object to the inclusion. It said that the application of the wheelage ratio, the indiscriminate application of the wheelage ratio, I think was the language used, to the building above the track [fol. 98k-394] level was not approved. I do not think that it suggested that it should be excluded entirely.

Q. On sheet 15 it says: "To state in summary the conclusion reached from the evidence, the proposed agreement imposes unreasonable terms upon The Long Island in respect to the inclusion of the entire station in the investment in Zone 1, and the inclusion of all operating expenses, maintenance and taxes connected with the station, the indiscriminate application of the wheelage ratio both to basic values and to expenses, and the employment of 6 per cent as the annual rate of interest on the value of the facilities." Why did you exclude the $15,000,000?

A. That seemed to be the easiest way out of the dilemma. We have done it once and we thought we would do it again. By taking it out entirely we remove the station building above the track level from all controversy, the extent of the use of the building by The Long Island.

Q. You took it out as far as interest and taxes were concerned?

A. Yes.

Q. You put 20 per cent of the operating and maintenance expenses on The Long Island?

A. That is true.

Q. The report commented on the fact that the agreement contained no specific value as to the power facilities and in response to that you put in a specific amount?

[fol. 98k-395] A. We did.

Q. And you also specified 5¾ per cent instead of 5 per cent as interest on deferred payments?

A. Yes. It made the interest rate the same, 5¾ per cent.

Q. This was not pursuant to any suggestion in the report?

A. No, we simply thought we would make it uniform throughout the agreement wherever there was any question of interest, to make it 5¾ per cent.

Q. These were all the substantial changes that were made in the agreement?

A. Yes, as I recall.

Q. Except for these, the proposed agreement is substantially the same as the one that was disapproved?

A. Yes, I think by comparison it is much easier to refer to the Transit Commission agreement. It is the same as the Transit Commission agreement with the exception that the rate of interest has been increased to 5¾ per cent and the 20 per cent of the station operating and maintenance expenses have been apportioned to The Long Island. It is quite different from the agreement which was rejected by the Interstate Commerce Commission.

Q. But I did not wish to compare it with the one approved by the Transit Commission, but I wish to compare this agreement which is now offered for approval with the one which did not get the approval of the Interstate Commerce Commission.

[fol. 98k-396] A. Yes.

Mr. Gardner: He has done both. I think he has given you both.

By Mr. Stover:

Q. You, yourself, said, I think, that one of the things objected to in the report was the indiscriminate application of the wheelage ratio both to basic values and to expenses?

A. Yes.

Q. Did you do anything to meet that objection?

A. Yes, we took out the $15,000,000 entirely for the station building in the basic value, and we took a fixed proportion, or 20 per cent of the operating and maintenance expenses and charged to The Long Island.

Q. That was the way in which you construed the objection raised by the report of the Interstate Commerce Commission?

A. Yes.

Q. I assume that when you prepared the agreement which was rejected and when you included in it the station building and the interest at the rate of 6 per cent you thought that you were right?

A. Yes.

Q. Are you now convinced that it is improper to do that?

A. No.

Q. The applicants still believe that that should be included?

A. Yes.

[fol. 98k-397] Q. Then why do you exclude it?

Mr. Gardner: We are resigned. We were told that it was improper to do it by the Interstate Commerce Commission and we deferred to their conclusion in the matter.

Exam. Sullivan: Let the witness answer if he knows.

By Mr. Stover:

Q. I take it that they were excluded merely because that if they were included the Interstate Commerce Commission would not approve this agreement?

A. That is it exactly.

Q. With your idea of what should be included then you would not regard this agreement as by any means ideal?

A. No.

Q. You do not regard it as being just as fair to The Pennsylvania as it is to The Long Island?

A. No.

Q. You think it is not as fair to The Pennsylvania as it is to The Long Island?

A. Yes.

Q. Is it not your understanding that the Interstate Commerce Commission looked for an agreement in which The Long Island and The Pennsylvania were given equally fair terms?

A. I assume so.

Q. Then assuming that, you think that this proposed agreement does not come up to that standard?

A. I think it does not.

Q. Do you know the amount of rental paid by The Penn-
[fol. 98k-398] sylvania to the Tunnel Company in 1930?

A. I think it was 5 per cent on the stock and something like——

Q. Do you know the total amount?

A. No, I do not know that.

Q. Or in 1929?

A. That is a certain amount of interest on indebedness and I think it is 5 per cent on the capital stock of the Terminal Railway.

Q. Do you know whether The Pennsylvania pays by way of rental anything as interest on investment?

A. Yes. The Pennsylvania pays to the Pennsylvania Terminal & Tunnel Company as rental interest on certain indebtedness and 5 per cent as dividends you might say on capital stock. I think that the total of the capital stock and the indebtedness about equals the investment in the terminal property because it was all financed by The Pennsylvania.

Q. But it pays rental according to the terms of the lease approved by the Interstate Commerce Commission?

A. Yes.

Q. And that lease provides for the payment of a sum equal to 5 per cent on the outstanding capital stock of $50,000,000?

A. That is right.

Q. And it also provides for the payment of interest on the bonded or other indebtedness of the Tunnel Company?

A. Yes.

[fol. 98k-399] Q. And that indebtedness is over $61,00-,000?

A. Something of that order.

Q. What rate of interest does it pay on that?

A. I do not recall now.

Q. Have you not had occasion to look at that in connection with this hearing?

A. No.

Q. Do you know whether the interest rate on that indebtedness has been increased from what it formerly had been?

A. As I say, I do not know. I have not inquired as to that.

Q. But it appears from the report of the Interstate Commerce Commission in 145 I. C. C. page 245: "The applicant

states that under the terms of the lease the annual rental will amount to approximately $5,250,000?

A. Yes.

Q. The rate on that $61,000,000 would have to be less than 5 per cent in order to bring the interest rate on that and the dividend at 5 per cent on the $50,000,000 within that $5,250,00?

A. It would appear so. If $112,000,000 is the total, 5 per cent of that is $5,600,000. It would appear that the interest paid on the indebtedness was somewhat less than 5 per cent and is somewhat less than 5 per cent.

Q. In all probability it was 4 per cent, was it not?

A. As I say, I really do not know.

[fol. 98k-400] Q. I am asking you from the probability now.

A. No, just running the thing over in my mind it seems to me it was something like 4½ per cent was the figure used on the indebtedness but I am not sure of that. I think that would run out to about that figure, too.

Q. Would you say that the interest would not be over 5 per cent?

A. That is right.

Q. Then it would appear that the Interstate Commerce Commission has approved a rate of interest which was not over 5 per cent?

A. Yes.

Q. You did not draft the agreement which is now here for approval?

A. I assisted Mr. Gardner in drafting it.

Mr. Gardner: Mr. Rawson did the drafting and I do not want to take the credit from him. We drafted it together, Mr. Stover.

Mr. Stover: What did you do in connection with the preparation of it?

Mr. Gardner: I object to that as irrelevant and immaterial.

Exam. Sullivan: Objection overruled.

The Witness: I determined the 20 per cent as the operating and maintenance expenses as a proper charge under the theory under which we were working.

[fol. 98k-401] By Mr. Stover:

Q. This agreement is to continue for 20 years and thereafter from year to year unless terminated at the end of 20

years or any subsequent year by six months prior notice in writing from one party to the other?

A. Yes, I think that is what it states.

Q. In other words, it is to continue indefinitely until terminated upon a notice provided in the agreement?

A. Yes.

Q. Article VI of the proposed agreement provides a method for modifying certain terms of the agreement at the end of five-year periods?

A. Yes.

Q. And what are the terms which may be modified pursuant to this article?

A. It says, "On the basis of which such interest rentals are computed."

Q. So that it is possible for the parties at the end of five years to change the rate of interest, from 5¾ per cent to 6 per cent?

A. Yes.

Q. Or even a higher rate?

A. Yes.

Q. And it is also possible to reinstate the $15,000,000 in the base upon which the interest rental is computed?

A. Yes.

[fol. 98k-402] Q. Or to change any of the amounts specified in Article III to a still higher amount?

A. Yes, I should think so.

Q. And they may make these changes without any appeal to the Interstate Commerce Commission?

Mr. Gardner: Not likely they would, Mr. Stover.

A. That I do not know.

Q. They may, as far as the agreement is concerned?

A. Yes. They might put the agreement into effect without the Interstate Commerce Commission if the law was changed, I suppose.

Q. Will you explain what is meant by direct operating charges?

A. Do you mean these direct charges?

Q. Exhibits 41 and 42.

A. That item of direct charges is principally the cost of the yard switching crews in the Pennsylvania station which are paid by The Long Island, that is for switching The Long Island cars from the station back into the yard and then back again into the station.

Q. Are those allocated on a wheelage basis?

A. No, they are not allocated at all. They are entirely separate. There is a separate force of men to do this work. They are Pennsylvania employees but they are services paid for by The Long Island and they work only in shifting The Long Island cars.

[fol. 98k-403] Q. These charges are not provided for in the agreement at all?

A. I think in the agreement there is something of that nature that certain charges were to be paid directly, but I do not know.

Q. Could you point out where?

A. The thing that refers to it here is on page 18, that is the fourth clause of the agreement, it says:

"Switching movements between the Pennsylvania station and Sunnyside Yard with the exception of movements of engines and cars necessary for the arrangement for make-up of trains in said station or in said yard, but not passing from one section to another section, shall be included in computing the number of cars and engines."

That is the thing that had reference to the car count than to the expenses.

Q. The effect of that is to exclude the direct charges from the contract?

A. Yes. It seems to me that one of the earlier agreements had something more specific about these items and that is the reason we have carried that item along from year to year from the beginning, but I am not sure of that.

Q. Are there any direct operating charges to The Pennsylvania?

A. Yes, they have similar charges.

Q. Do you know what they are in amount?

A. No, I do not know.

[fol. 98k-404] Q. Approximately?

A. No, I really have no idea.

Q. Since these direct operating charges are excluded from the agreement, they can be modified without reference to the agreement?

A. Yes.

Q. At a prior hearing I think you stated that in your opinion the method of counting the cars was favorable to The Long Island?

A. Yes.

Q. That is another matter that is not provided for in the agreement, is it not?

A. I think that is provided for pretty definitely in the agreement.

Q. The method of counting cars?

A. Yes, certain cars should be counted and others should be excluded. Switching movements shall be counted when passing from one section to the other. Switching movements in a section shall not be counted. One locomotive shall be counted as three cars and that is all set forth in the agreement.

Q. But as I recall it one of the items in which you thought The Long Island was favorable, the number of times that a Pennsylvania car was counted going into and out of the station movement?

A. Yes, because that is the cars that we count between [fol. 98k-405] the station and Sunnyside Yard.

Q. But that provision is not provided for by the agreement in any place?

A. Oh, yes, the agreement says just where we have been reading that they should be included, the switching movements between the station and the yard.

Q. The agreement excludes The Long Island from sharing in the concession receipts because it pays no interest and taxes on the station building above the track level?

A. Yes.

Q. Are all the concession receipts derived from the station building above the track level?

A. Practically all.

Q. Are not some receipts derived from concessions in the Long Island waiting room?

A. That is above the track level, yes.

Q. The Long Island waiting room is on the exit concourse level which is the first level above the track level?

A. Yes.

Q. And there are concessionaires there?

A. There are, yes.

Q. Do you know how much that concession amounts to?

A. No, I do not, offhand.

Q. Why should not The Long Island share in the receipt of those concessions?

[fol. 98k-406] A. Our feeling in that was that The Long Island to all intents and purposes is a free tenant as far as the station building above the track level is concerned and that the landlord was therefore entitled to everything he could get from the station building above the track level as long as The Long Island Railroad was not paying any rent.

Q. To ask a more fundamental question, why should not The Long Island share in the concession receipts generally?

A. That was the reason; they are not paying any rent. The concession receipts are almost entirely from the station building above the track level with very little outside of that.

Q. Are there any concessions in other zones except the station zone?

A. Only in the way of some rental for ducts under the river that the Telephone Company pays a few thousand dollars a year, and there may be some privileges for advertising signs up in the Sunnyside Yard, a few dollars there, but that is all.

Q. You mean the telephone ducts are only west of Tenth Avenue?

A. No.

Q. They run right straight through?

A. They run right through, yes.

Q. The provision of counting an engine as three cars which you spoke of has been in all the agreements from the earliest one on?

A. Yes.

[fol. 98k-407] Q. That was not forced on the companies by the Transit Commission or its predecessor?

A. No.

Q. They agreed upon it themselves?

A. Yes.

Q. And why did they provide for that?

A. I think originally they estimated that an engine weighed about as much as three cars and I guess that was probably the basis of counting it for three cars rather than one car or two cars.

Q. Did it weigh three cars?

A. Yes, the locomotive weighs, the earlier Pennsylvania locomotive weighed I think about 160 tons and the passenger coaches and The Long Island multiple unit coaches weighed between 50 and 60 tons, so that the weight of the

locomotive was about three times the weight of a passenger car at the time the agreements were first made.

Q. Has that been altered since, the relative weights?

A. I do not think the relative weight has been altered because the later locomotives are heavier than the earlier ones and some of the newer cars are heavier than the earlier ones.

Q. I gathered from your reply that originally the engines did weigh three times as much as a car, but since then something has taken place which reduced the weight of the engine or increased the weight of the car?

[fol. 98k-408] A. No, I do not think so.

Q. What is true at the time of the first agreement is substantially true now?

A. I think so, yes.

Q. Being heavier, they would, of course, use more power?

A. Yes.

Q. And they would produce more wear on the tracks?

A. Yes.

Q. And you think that was the reason why the companies themselves elected to treat an engine as the equivalent of three cars?

A. Yes, that is my recollection.

Q. Do you believe that the companies themselves felt that the wheelage basis in itself was inequitable unless mitigated in some way and that this was a slight mitigation of the effect of it?

A. No, I do not think so.

Q. You think they were just influenced by the reasons you have already stated?

A. Yes, particularly because the character of the business of the two companies was quite different. The Long Island trains being trains of all multiple unit cars without locomotives, and the Pennsylvania trains being trains with locomotives.

Q. Who is the President of The Long Island Railroad Company?

A. At the present time?

[fol. 98k-409] Q. Yes.

A. General Atterbury.

Q. And who is the President of The Pennsylvania?

A. General Atterbury is also President of The Pennsylvania.

Q. And how many vice-presidents are there in The Long Island?

A. I do not recall now. I think a great many of the Pennsylvania vice-presidents are vice-presidents of The Long Island, but just how many I do not recall.

Q. Do you recall any Long Island vice-president who is not also a vice-president of The Pennsylvania?

A. No.

Q. Do you know how many directors there are on The Long Island?

A. I do not recall now. The annual report would show that. There are 12 or 14.

Q. They are all directors of The Pennsylvania as well?

A. No. There are several Long Island directors who are not directors of The Pennsylvania or officers of The Pennsylvania.

Q. Who are they?

A. I have forgotten the names.

Mr. Gardner: I submit that if he wants this answered from the stand we will get a correct list and give it to him instead of guessing at it, who they are.

Mr. Stover: All right.

By Mr. Stover:

Q. The Comptroller for The Long Island and the Comptroller for The Pennsylvania are identical?

[fol. 98k-410] A. Yes.

Q. And do you know any other officers that the two companies have in common?

A. I say almost all of the officers are in common.

Q. Do your duties as special engineer involve any connection with the joint facilities?

A. Simply this preparation of these agreements and an observation of the working of the agreement.

Q. What does that observation of the working of the agreement involve?

A. The working out of the results and seeing what the results are under the agreement.

Q. Do you do that periodically?

A. Yes.

Q. Have you any persons that works with you on this?

A. I simply get the statement from the supervisor of divisional expenditures who handle the accounts and go over them and see what they show.

Mr. Gardner: And you have been doing it since 1910?

The Witness: Yes.

Mr. Gardner: You have already testified to that?

The Witness: Yes, I think so.

By Mr. Stover:

Q. Who directs you in that work?

A. I think that work I do generally under the personal direction of the vice-president, Mr. LeBoutillier or the [fol. 98k-411] president before him.

Q. Is there anybody of coordinated authority that works with you in that matter?

A. No, I do not think so.

Q. And whom do you represent in that work?

A. For a good many years I represented The Long Island and I suppose I still represent The Long Island more than The Pennsylvania. The work of late years has been more coordinated and consolidated.

Q. Is there anybody besides yourself that represents the Pennsylvania?

A. In a good many of these conferences we have had with reference to this agreement, representatives of the Comptroller's office of The Pennsylvania have worked with me.

Q. Any engineers?

A. Engineers and accountants, both.

Q. On special occasions?

A. Yes.

Q. But not regularly?

A. No.

Q. Regularly you have more to do with these joint facilities than anybody else?

Mr. Gardner: That is pretty broad.

A. Except the routine preparation of the charges.

Q. At a prior hearing you gave some testimony which [fol. 98k-412] I feel might be misleading. You said that The Long Island passengers have always had access to the

entire building and had used all parts of it. You did not mean that literally, did you?

A. Of course, possibly not literally and strictly in that they have not had access to the private offices or working part of it, where the baggage is handled but they have had access to all parts of the building which are accessible to the public in general.

Q. Let us see if we can find out what those parts are.

Mr. Gardner: We are taking the building out. I do not know why we spend any time on that.

Mr. Stover: You have put in 20 per cent of the operating cost of the building.

Mr. Gardner: Of course we are. Your Commission would not give us anything for operating costs.

Exam. Sullivan: Do not argue the case now, gentlemen. Go ahead with your examination.

By Mr. Stover:

Q. I refer to your Exhibit No. 9, take the attic floor plan D-4368. Have you got that exhibit?

A. I have not got a copy right here.

Mr. Gardner: You might let Mr. Rawson look at your copy.

Mr. Stover: Surely.

By Mr. Stover:

Q. On that floor there are kitchens and gymnasia and dormitories and lockers and shower baths and bowling [fol. 98k-413] alleys and Y. M. C. A. reception room and reading room and billiards and class room and lecture room. The Long Island passengers do not use any of those facilities?

A. None of the passengers use those facilities. The Y. M. C. A. is used by the employees of both The Long Island and The Pennsylvania. Those facilities that you have mentioned are all parts of this Y. M. C. A.

Q. They were designed for the comfort and the convenience of railroad employees?

A. Yes.

Q. Are they not used principally by Pennsylvania employees?

A. No, they are used by both.

Q. Do you say that of your own knowledge?

A. Yes. The Long Island employees, a great many of them lay over in New York for three or four or five and six hours in the middle of the day and I think they make quite an extensive use of the Y. M. C. A. during that period.

Q. Was not the purpose of these accommodations, notably the dormitories to provide a place for trainment who find themselves in New York miles away from their home at the end of a long run?

A. The dormitories, yes.

Q. Those would be Pennsylvania employees?

A. Largely Pennsylvania, yes.

Q. There are not any Long Island trains that lay over at Pennsylvania station at night, are there?

[fol. 98k-414] A. There are a considerable number of Long Island runs which start in the morning from the Pennsylvania station and terminate at the Pennsylvania station at night. I do not know how many Long Island employees make use of these dormitory facilities.

Q. But as a rule the Long Island trains, I think you have testified at the prior hearing, run out of the station in the afternoon or at night and are at the eastern terminal ready to make their run into the station in the morning?

A. Yes.

Exam. Sullivan: Mr. Stover, in view of the fact that the building above the track level is omitted from the plan submitted by the applicant here, do you consider this matter pertinent to this proceeding?

Mr. Stover: Yes, they want to put in 20 per cent of the operating expenses and maintenance of the station.

Exam. Sullivan: That is of the entire building?

Mr. Stover: Yes.

Exam. Sullivan: All right, go ahead.

Mr. Stover: I regret to do it because it is long-winded.

Exam. Sullivan: Go ahead.

By Mr. Stover:

Q. As to the street level plan D-4098, in the westerly end there are motormen and conductors' locker and lunch rooms. Are not those intended rather for the use of The Long Island employees during the day than those facilities up at the top of the building?

[fol. 98k-415] A. These locker rooms are where the trainmen have their lockers where they can keep some of their things. I suppose some of them still bring their lunch with them and there are tables there where they can sit down and they write out their reports and the ticket receiver's office is right near there and they have to write out their reports and turn them into the ticket receiver. The ticket receiver serves both for The Long Island and The Pennsylvania.

Q. Turning back to the attic floor, those facilities were put there when the station was built?

A. Yes, the Y. M. C. A. was established there when the station was built.

Q. And at that time it was not anticipated that there would be any great Long Island traffic?

Mr. Gardner: Are you asking that as a question?

Mr. Stover: Yes.

A. It seems to me there was.

Q. Did the track layout indicate it?

A. Not as extensive as it has turned out to be, but we expected to have a large Long Island traffic into the station.

Q. But nothing like what it is at present?

A. No, I do not believe anybody could foresee or did foresee at that time that the Long Island traffic would grow as it has grown.

Q. They evidently felt that the Pennsylvania traffic would be greater than the Long Island traffic?

[fol. 98k-416] Mr. Gardner: Was that a statement or a question? I think these questions should be put in the form of a question. He tries to put words in the witness's mouth by making statements.

Mr. Stover: The tone of voice indicates whether it is a question or not.

Exam. Sullivan: Will you repeat that question?

(Last question repeated as recorded.)

A. As far as the number of cars are concerned, I think, yes. As far as passengers are concerned, I do not know. I doubt it.

Q. My only point was to ask you if it does not appear at that time, from circumstances at that time, that these facilities were designed with primary reference to the convenience of The Pennsylvania employees?

A. I think so, yes. The Pennsylvania employees, there are quite a number of them, as you say, that have runs into New York and live elsewhere, maybe 100 or 200 miles away, and the Long Island employees almost all have their own homes in the vicinity of New York where they can get to their work every day and go back home at night.

Q. Assuming that The Long Island employees have the right to use these, have you any definite knowledge as to the extent with which they use this?

Mr. Gardner: Are you speaking of night or day? You have asked about sleeping quarters and you have wandered [fol. 98k-417] around specific approaches, but do you mean all the time?

Mr. Stover: For all these facilities.

A. I do not know the relative extent by which they are used by Long Island and by Pennsylvania. I do know that they are used by both. There are employees of both companies making use of the Y. M. C. A., and whether it is 20 per cent of one and 80 per cent of the other, 70 and 30, I do not know.

Exam. Sullivan: We will resume at two o'clock.

(Whereupon, at 12:30 p. m., a recess was taken until 2:00 p. m.)

After Recess, 2:00 p. m.

Exam. Sullivan: All right, Mr. Stover.

Hobart Rawson resumed:

Cross-examination (continued).

By Mr. Stover:

Q. Mr. Rawson, perhaps I may be able to shorten the cross-examination on this line by asking you the question

in this form: Is there any part of the so-called attic floor which is used by Long Island passengers?

A. No.

Q. And is there any part of the third floor plan that is used by Long Island passengers?

A. No, not as passengers.

Q. Or of the second floor plan?

A. No, the second floor plan, either.

[fol. 98k-418] By Exam. Sullivan:

Q. Are any of these floors used by Pennsylvania passengers?

A. No.

By Mr. Stover:

Q. Then to understand how much of the space of the building is used by Long Island passengers or others we can confine our attention to the three lower levels?

A. Yes, the exit concourse, the main concourse and the street levels.

Q. Take the exit concourse, Level D-4639. I am not an expert in reading plans, but to me it would seem that the southerly half of this level is used for Pennsylvania purposes rather than Long Island?

A. The large area in the southeast portion here, that is open at this level.

Q. Excluded from that level?

A. Yes, excluded from that level. The portion toward the westerly part of the station, what they call the main exit concourse is used by passengers from the Pennsylvania trains and passengers from a number of Long Island trains come in in the morning rush hour on tracks 5 and 6, I think that serves Platform No. 4, I think, either 3 or 4—to relieve the overcrowding on the tracks normally used on The Land Island that is on the north side of the station.

In the morning rush hour a number of Long Island trains are brought in there are those passengers are discharged [fol. 98k-419] into the Pennsylvania exit concourse level and some of them come into the main concourse and distribute around.

Q. But the use made of that southerly portion is in the concourse for passengers leading from there to the street?

A. Yes.

Q. The Long Island waiting room and concourse is in the northeast corner of that level?

A. Yes, it is.

Q. What is the height of The Long Island waiting room?

A. I do not recall offhand but——

Q. Is there anything in these plans that would indicate that?

A. I think there may be. I do not remember whether they show—yes, this shows the elevation, this exit concourse level is 308 and the next level is 319 and the street level is 330. All this Long Island concourse goes from the exit concourse level up to the street level.

Q. It does?

A. Yes. You see, this part in here——

Mr. Gardner: We will have to describe that for the stenographer.

A. (continued). The part that is called the concourse *l.rr.* In the northerly half of the space occupied by the Long Island facilities in the northeast corner goes way up to the street level. There is nothing on the main concourse level there. The other part of it goes only to the exit concourse level because the cab ramp comes down in there.

[fol. 98k-420] Q. What is the floor level on the street level?

A. The floor level on the street level is elevation 330 so that that would be somewhere around 22 feet for the height of the northerly part of The Long Island concourse and probably 11 or 12 feet for the height of the balance.

Q. It would not be only 11, would it?

A. 308.32 and 319, 11 feet.

Q. It would be 11 feet——

A. That is the southerly half where the waiting room is and the southerly portion of the entrance concourse.

Q. And it would be 20-odd feet along the very northerly part of that?

A. Yes.

Q. Next to the wall?

A. Yes.

Q. The ticket offices are just north of the waiting room and adjacent thereto?

A. Yes, the ticket offices are between the waiting room and the concourse. It is along the north side and including the passageway to the subway.

Q. But just west of the waiting room in the ticket room there is another concourse space?

A. Another concourse space.

Q. Between there and the entrance to The Long Island trains?

[fol. 98k-421] A. Yes.

Q. In that part of it the roof is about 11 feet?

A. Yes.

Q. In that northeast corner there is an entrance to the subway?

A. Yes.

Q. And from that subway entrance running along the northerly wall is a passageway leading from there to the westerly wall of the station?

A. Yes, that of course, is all what we might call the exit concourse used by the Long Island passengers. That is, there are stairways all along that passageway, the southern side of that passageway which lead up from the platform at which many of the Long Island trains arrive.

Q. That passageway could also be used by Pennsylvania passengers?

A. It could, yes. There is another passageway leading directly from the center of the main exit concourse used by Pennsylvania passengers right to the subway. That runs through the center of the station.

Q. There are two passageways leading to the subways?

A. Yes.

Q. With different entrances to the subways?

A. Yes, one leading to the entrance near 33rd street and the other to the entrance near 32nd street.

Mr. Gardner: There are more than two, Mr. Stover, there are more than two entrances to the subway.

[fol. 98k-422] The Witness: There are two passageways from the exit concourse level of the station to the subway.

Q. Not far from the subway entrance in the northeast corner there is a broad iron stairway leading up to the Pennsylvania level above?

A. Yes.

Q. Pennsylvania passengers coming through this subway entrance could either pass up that stairway to the Pennsylvania level or pass along the passageway which runs along the northerly side to the concourse at the westerly end?

A. Yes, they can take either routes.

Q. The Long Island waiting room used to be larger than it is now, was it not?

A. I think the enclosed portion of the waiting room, yes. That has been altered several times since it was originally built, and it has had different sizes at different times as conditions warrant. The last time they took what used to be the waiting room which is in the northerly half of the space assigned to The Long Island and turned that into a concourse so as to facilitate the movement of passengers to and from the subway and the passageway leading to Gimbels and Sixth Avenue.

Q. Was not that done partly in order to give better passageway for The Pennsylvania passengers who happened to come in by that subway entrance?

[fol. 98k-423] A. It would, but it was done primarily because of the large number of passengers going to and from The Long Island trains.

Q. Do you know how many square feet in that area is exclusively used by The Long Island?

A. That is rather difficult to say.

Q. Is there anything on the map from which method could be figured out?

A. The map is scaled and all, and any particular portion of this, the area can be calculated by using a scale on the map. It says 1/32 of an inch to a foot.

Q. In order to do that we should have to first define the part of that level which is exclusively used?

A. Yes.

Q. Is there any way at present in which you can aid us in getting light on the question I have asked, namely, as to the number of square feet on that level used exclusively by The Long Island?

A. Of course, Mr. Stover, it is difficult to define what is used exclusively by The Long Island, because The Pennsylvania passengers have free access to all of that space just the same as The Long Island passengers have fress access to the space by the Pennsylvania ticket offices and the main concourse in the Pennsylvania part of the station so-called. Speaking generally it is my opinion that this entire northeast corner might be considered as being used exclu-

[fol. 98k-424] sively by The Long Island, that is, it would only be occasional Pennsylvania passengers who would

choose that route in going to and from their trains. There would be such a small proportion that I think for purposes of any computation you could say that that whole side was esxclusively the Long Island's. I do not believe you could narrow it down any further.

Mr. Victory: I move to strike out that answer as merely conjectural.

Exam. Sullivan: Motion denied.

By Mr. Stover:

Q. The Pennsylvania passengers you say can and do enter by that entrance in the northeast corner?

A. To some extent I think, yes. Just how much, I do not know.

Q. You have made no count to determine the relative number of passengers?

A. No; we have discussed that many times, the possibility of doing that, and never could arrive at a satisfactory way in which to establish that. There are so many different currents of movement, so many routes that the passengers could take or even people who are not passengers—there are quite a number, our general observation indicates, who pass through the station who never go to the trains at all, but they use it for a convenient method of getting from Seventh Avenue over to Eighth Avenue or beyond.

Q. You say there are several passages that may be used?

A. Yes.

[fol. 98k-425] Q. Does the map show one or two?

A. You can come from the subway here at the northeast corner, come through the exit concourse level and all the way around and then up some of these stairways to the main concourse. I am speaking now of passengers boarding Pennsylvania trains. They have to come to the main concourse level. They can come in that same passageway and come up the stairway which leads to the main waiting room which is up here.

They can come in from 32nd Street and go through the passageway at the center of the station or they can come from 32nd Street into The Long Island waiting room concourse and around that through the exit concourse so that as I say, there are several routes which they might take.

Q. I see what you mean. But what I had in mind was this, there are only two entrances to the building from the subway?

A. Yes.

Q. You mean that after they enter by one of those they have alternative routes and they can go in various directions?

A. Yes, that is it, Mr. Stover.

Q. But there are only two entrances from the subway?

A. Yes.

Q. If passengers arrive at The Pennsylvania station on the subway, the particular entrance that they use to enter the station building would depend very largely on what portion of the subway train they happen to be when the car stopped?

A. I think so, yes.

[fol. 98k-426] Q. You cannot make it any more definite than that?

A. No.

Q. Do you know how many square feet of this exit concourse level consists of passageways or floor space which is capable of being used by passengers?

A. No, not exactly, but I think taking the space and just looking at the map and making a rough estimate, 25 per cent of that level would come within your definition of passageways which might be used.

Q. A large part of it is area which could not be used by passengers?

A. Yes, there is a large area in here that is used for baggage purposes and for the service of the station, that is pipe galleries and things of that kind, and there are of course the stores all along both concourses, there is the waitingroom, ticket offices, toilet rooms, which are all on that level and none of which I would consider to be passageways.

Q. And I think you said that the exit concourse level as such does not occupy all the space or building area within the building line?

A. No.

Q. Do you know how many square feet it does occupy?

A. No, I do not. It is outlined on this map in red.

Q. Do you know how much of that exit concourse level is occupied by concessionaires and stores, do you recall?

[fol. 98k-427] A. Not in either square feet or proportion, but quite a little of it; there are stores all along the main exit concourse both sides. And the same is true of the Long Island concourse there.

Q. Are those stores for concessionaires for Long Island passengers exclusively?

A. Not necessarily, no.

Q. There is a probability, is there not, that the concessionaires in the waiting room itself might come more nearly to serving the Long Island passengers exclusively than any of the other concessions?

A. Yes, I think so.

Q. Take the next sheet and that is named, "Waiting room and concourse D-4097." Do you know how many square feet of the area within the building line is devoted to this level?

A. I do not know the number of square feet without computing it, but a large part of the area within the building line is on this main concourse level. There are only comparatively small parts of it which have not a floor on the main concourse level.

Q. This is the level that is used primarily by Pennsylvania and the Pennsylvania passengers, is it not?

A. Yes.

Q. And it is only used by the Long Island passangers who may happen to pass through it in taking or leaving trains on the level below?

[fol. 98k-428] A. Yes, to a large extent.

Q. To what extent do they use it other than in passing through?

A. The only principal thing would be if Long Island passengers would have to wait any considerable length of time they do come up in the main waiting room because of the better facilities that are provided there for passengers who have to wait a long time.

Q. At the westerly end of this level is a space marked "Concourse"?

A. Yes.

Q. What is the area in square feet of this concourse?

A. I have not any of those areas in my head, Mr. Stover. It can all be calculated from the map.

Q. That particular one can easily be calculated?

A. Yes.

Q. By applying the scale?

A. Yes.

Q. And at the top of this concourse, as I recall, is a dome?

A. It is a large glass roof.

Q. A large glass roof?

A. Yes.

Q. And how high is that roof from the floor?

A. I do not recall just what the height is there, but it may be 50 to 75 feet.

Q. Is not there something in exhibit 9 by which we can [fol. 98k-429] approximate the height? What is the floor elevation?

A. The floor elevation of the main waiting room and concourse is 319.

Q. That is the floor level?

A. Yes. The attic floor is 382. That roof——

Q. And that is the floor level?

A. Yes, that is this attic.

Q. That is the attic floor?

A. The attic floor level.

Q. Just a moment. What I mean is, that 382 is the point from which you measure, that downward in the floor itself and not the ceiling?

A. 382 is the attic floor level. I am just trying to think. I think that roof over the concourse is just about, maybe a little bit above the attic floor level.

Q. Is it not above the attic floor roof?

A. No. I do not think so. The highest part of the station building is the part over the main waiting room, the general waiting room, that arch. I think the roof over the concourse is a little lower and my recollection is just about the attic floor level. Maybe it is a little higher.

Q. The plan then would indicate that from the floor of the concourse to the glass roof it was over 63 feet?

A. Yes.

Q. And you do not know how high the attic roof is at that point?

[fol. 98k-430] A. No, it is not very high. The ceilings in the attic are not very high. But this roof is an arched roof and I know the base of the arch is considerably below the attic floor level. The top of the peak is probably above——

Q. You say considerably below. How much in feet?

A. Why, I think ten or twelve feet.

Q. But the peak of the dome——

A. The peak of the dome I think is above. It may be as high as the attic roof level and it may be a little above it.

Q. Just east of this concourse of which we have been speaking there is a men's waiting room and a women's waiting room?

A. Yes.

Q. The area of those two could be computed from this map?

A. Yes, very easily.

Q. You do not know what the area is?

A. No.

Q. And do you know how high they are?

A. Those are rooms I should say maybe 30 feet or so. They are quite high but nothing like as high as either the concourse or the general waiting room.

Q And then just east of those is an area marked general waiting room?

A. General waiting room.

Q. And there are no seats there?

A. No.

Q. That is a large space somewhat similar to the concourse?

[fol. 98k-431] A. Yes, except that that is heated and it is lined by the ticket offices and telephone booths and facilities of that kind.

Q. But the height is similar?

A. Yes, the height is even greater I think than the exit concourse height.

Q. The distance from the floor to the dome would be the greatest part of the height of any room in the building?

A. Yes, I think so.

Q. An airplane is parked in this waiting room?

A. Yes.

Q. And does that interfere with the use of that general waiting room?

A. I do not think so, not materially.

Q. That is a very spacious waiting room?

A. A very spacious waiting room.

Q. And you do not know the area in square feet of it?

A. No.

Q. That can also be computed?

A. Yes.

Q. The amount of cubic space represented by the concourse, the men's and women's waiting room and the general waiting room and the space between the general waiting room and concourse is very considerable, is it not?

A. Yes.

[fol. 98k-432] Q. Do you know how much it is?

A. No, I do not.

Q. But it would represent a large proportion of the cubic space of the entire building?

A. A considerable proportion, yes.

Q. Let us take the next sheet, D-4098, street level. Comparatively little of the area within the building line is represented by that level?

A. Yes, comparatively little. Just the arcade and the offices in the rear end, the bank and offices in the front, the Seventh Avenue front and the entrance to the two cab ramps.

Q. At the westerly end surrounding three sides of the concourse on the level below are office buildings?

A. Office space, yes.

Q. Office space?

A. Yes.

Q. And the Long Island passengers do not use that?

A. No.

Q. And the next space on the level is the barber shop——

A. Yes.

Q. —on the northerly side and in the corresponding location the upper part of a women's retiring room at the southerly side?

A. Yes.

[fol. 98k-433] Q. Do The Long Island passengers use those?

A. Not unless they have reason to go there, that is, they might use that barber shop or they might use the one down in the exit concourse level near The Long Island waiting room.

Q. There is a large barber shop on the exit concourse?

A. Yes, a barber there as well.

Q. It is much more probable that people would use that one rather than climbing up to use that one on the upper level?

A. I think so.

Q. The next space on the level is the dining room and restaurant?

A. Yes, the lunch room and restaurant.

Q. Do The Long Island passengers use these to any considerable extent?

A. Why, I do not know that they do. Those restaurants are of course, patronized by passengers, by outsiders, to quite a little — now. Just how much The Long Island passengers use them I do not know.

Q. There is a Savrin bar in The Long Island waiting room?

A. Yes, that is just a counter like a soda fountain and drug store.

Q. It is not very probable, is it, that many Long Island commuters would use this restaurant and dining room?

A. I doubt if the commuters use any of those.

Q. The next space on the level is the arcade. That leads [fol. 98k-434] from Seventh Avenue down a flight of steps to the general waiting room on the level below?

A. Yes.

Q. Do you know the dimensions of that arcade?

A. No. That is easily calculated.

Q. Also can be calculated?

A. Yes.

Q. And do you know how high it is?

A. The height of that extends up practically to the roof of the main building, probably 50 or more feet.

Q. That is really the main entrance to the Pennsylvania station?

A. Yes.

Q. And do you know to what extent Long Island passengers use that?

A. That I think *it* used mostly by Long Island passengers coming in in the morning who come up through the main concourse and want to go out and walk up or down Seventh Avenue.

Q. And they would not be very likely to use it at night?

A. No.

Q. To the right as you enter there is a stairway leading down to the subway and to The Long Island trains?

A. Yes, The Long Island passengers boarding The Long Island trains at night probably would use that stairway rather than walk through the arcade unless they had lots of time.

[fol. 98k-435] Q. Along the sides of the arcade are concessionaires?

A. Yes.

Q. And do you know to what extent The Long Island passengers patronize those?

A. No, I do not.

Q. They are accessible to the general public from Seventh Avenue?

A. They are, yes.

Q. And at the front of the building to the left as you enter are offices?

A. Yes, those are the passenger traffic offices of The Pennsylvania.

Q. And the Long Island passengers do not use those?

A. No.

Q. And on Seventh Avenue to the right as you enter the Corn Exchange Bank?

A. Yes.

Q. And have you any idea to what extent Long Island passengers use that?

A. I do not know.

Q. They do not use it at all as passengers?

A. They would not use it as passengers and neither would The Pennsylvania.

Q. Is it not true that practically the only use that Long Island passengers make of the main concourse level or the [fol. 98k-436] street level is passing through or possibly patronizing the concessionaires that are located there?

A. Yes, I think so.

Q. Is there any detriment to The Pennsylvania in having Long Island passengers and the general public patronize these concessionaires?

A. I do not think so.

Q. It is an indirect benefit to the Pennsylvania station to do so?

A. I should think so.

Q. That amount of patron*ize* tends to enhance the value of the privilege?

A. Yes.

Q. And thereby increase the rental received by The Pennsylvania Railroad?

A. Yes.

Q. The Pennsylvania does not do anything to discourage patronage by Long Island passengers or others?

A. No.

Q. At what hours do The Long Island trains come in on The Pennsylvania tracks so that passengers come up on to The Pennsylvania concourse?

A. Between 7:30 and 9:30 in the morning.

Q. They do not have to come up on that concourse, do they?

A. They have to come on either the exit concourse or the main concourse of The Pennsylvania.

[fol. 98k-437] Q. I am talking about the main concourse now. They do not have to come up on that now?

A. No, they do not have to do that. They do that to avoid the crowding in the main concourse.

Q. And how long does it take such passengers to leave the building?

A. I think it is a maximum of five minutes.

Q. These passengers that come in the morning do not take their train at that concourse at night, do they?

A. No.

Q. So that the only use they make of it is for about five minutes in the morning?

A. Yes, but there are a large number of them. You might say five minutes for each passenger but it is during a period of two hours that the trains are coming in there one after the other.

Q. How long would you say?

A. I think we figure that about 10,000 passengers are in on those trains which use those tracks. I think that was the testimony I gave before.

Q. Do you not believe that many people who are not passengers of either railroad pass through this building?

A. There are, I think, quite a number, yes.

Q. At what hours is The Long Island waiting room crowded?

A. The Long Island waiting room, that is the little part there where it is pretty well filled, has the seats pretty well [fol. 98k-438] filled all day.

Q. You would not say that it is crowded, would you?

A. I think if you go in almost any time of the day you might have to wait a while to get a seat.

Q. You said that in the hours in which they are crowded, passengers went upstairs and waited in the Pennsylvania room?

A. Yes, I said particularly if they had any length of time to wait so that they did not want to stand around or wait for a chance to get a seat or sit out in the main Long Island concourse there which is not heated.

Q. Did I understand you to say that that Long Island waiting room is crowded at all hours of the day?

A. Yes, I think my observation has been that the seats are pretty well filled most of the day.

Q. Do you know by whom?

A. I assume by people waiting to take The Long Island trains. I do not know.

Q. Would not the greatest crowding, Mr. Rawson, be likely to occur during the rush hours?

A. The crowding during the rush hours is occasioned more by the people who are going to the trains. They are not waiting for the trains. I think you will find the people waiting for a considerable part of the time, that they are during different parts of the day.

Q. There are seats in the westerly end of this exit con- [fol. 98k-439] course level, are there not?

A. There are a few seats there, yes. That is where The Pennsylvania trains arrive.

Q. Would it not be more convenient for people to wait on the same level in those seats than it would be to climb upstairs and wait in the Pennsylvania waiting room?

A. No, that is not nearly as pleasant a place to wait. It is not as well heated to start with, although it has been enclosed this last year.

Q. But it is nearer to the train?

A. Well, very little difference. Simply a case of one *case of* going up a flight of stairs.

Q. Is there any announcement made in The Pennsylvania waiting room as to the time on which Long Island trains leave?

A. I do not think so, no.

Q. And do you know how long it takes a person to get from The Pennsylvania waiting room down to his train on The Long Island tracks?

A. I should say about three minutes.

Q. Can you suggest anything that I could do to verify the statement that Long Island passengers go up and wait in The Pennsylvania waiting room?

A. No. I say, we have thought out a great many schemes of trying to determine the movement of passengers in the station and they all seem to have their objections and at [fol. 98k-440] best it would be only an estimate.

Q. Suppose I watched a crowd of Long Island passengers and saw somebody detatch himself and followed him up to The Pennsylvania waiting room and watched him, and then saw him return to The Long Island track? That would be a way of determining that a Long Island passenger did do that?

A. I suppose so, yes.

Q. Is there any other way?

A. No, I do not think so unless you——

Exam. Sullivan: You might stand in the waiting room and holler and ask how many people are going out on The Long Island and then count them when they stood up.

By Mr. Stover:

Q. Did you ever follow that course?

A. No.

Q. There is not any way to tell by looking at them whether the people in The Pennsylvania waiting room are Long Island passengers or not?

A. No.

Q. They may be members of the general public?

A. Yes.

Q. People waiting to make an appointment with somebody?

A. That is it.

Q. At the prior hearing you said that the traffic of The Long Island had grown tremendously since The Long Island trains had been brought into The Pennsylvania station [fol. 98k-441] and that this was largely due to the ability of The Long Island to use The Pennsylvania station. You did not mean to imply that this increase was due entirely

to The Long Island's connection with The Pennsylvania, did you?

A. No, I think that that might be a little too broad to say that they do entirely. There are undoubtedly other forces at work which brought the people out on Long Island, but I think that that was one of the main if not the main thing which contributed to the growth of The Long Island and the passengers using The Long Island Railroad.

Q. You would concede, I suppose, that there would have been some growth in Long Island traffic even if there had not been any connection with The Pennsylvania?

A. I think so.

Q. As the population of Long Island and particularly in Kings and Queens increased, some percentage of that increase would have served to swell The Long Island traffic, would it not?

A. Yes.

Q. Growth in traffic naturally follows growth in population?

A. Yes, and conversely traffic facilities contribute to growth of population.

Q. I suppose you would concede that the growth of New York City is not due entirely to The Long Island or to the Pennsylvania Station?

A. Certainly.

[fol. 98k-442] Q. It is due largely to geographical location and its harbor and its miles of waterfront, is it not?

A. That was one of the main factors I think.

Q. And the fact that it is the financial center of the entire country?

A. Yes.

Q. Do you know that the size and height and capacity of buildings in Manhattan have increased in the last ten years?

Mr. Gardner: Are we not getting some obviously recognized facts here far remote from any issue which is before the Commission? We all know that the height of buildings increased in ten years, and I submit that that is a frivolous line of statement to be put on this record as bearing on this case.

Mr. Stover: I hardly think it is, Mr. Gardner.

Mr. Gardner: We are not contending that the City of New York is not growing tremendously from causes remote from The Long Island Railroad. Nobody contends that, of course. It is absurd.

Mr. Stover: Manhattan has really become more of a business and commercial borough than it has as a residential borough.

Mr. Gardner: I object to it as irrelevant.

Exam. Sullivan: I presume counsel is leading up to something.

Mr. Stover: Surely.

[fol. 98k-443] Mr. Gardner: He has been leading up to things all morning, your Honor, and I say it very seriously, and never getting anywhere. There are very distinct issues here. We have been sent back from your Honorable Commission to prepare and modify a proposed contract. We have done so. Is he trying the whole case over and going to question what made New York City grow, that Manhattan, because of its port facilities, has grown so much, and asks to concede if it has grown, and asks us to concede whether in the last ten years the height of buildings had grown. There should be a limit. I recognize your liberality in investigations of this kind with respect to the introduction of evidence and the relaxation of rules, but I submit these last few questions go beyond that limit.

Exam. Sullivan: I have taken it for granted that the questions were preliminary to something else that counsel is leading up to something, and for that reason I think he might proceed.

Mr. Stover: Then would you answer the question, please?

Mr. Gardner: Mr. Stenographer, will you read the question? It is probably a statement rather than a question.

(Last question repeated.)

A. Yes.

By Mr. Stover:

Q. Manhattan is relatively losing population, is it not?

[fol. 98k-444] A. Yes.

Q. It is becoming more of a business borough than a residential borough?

A. Yes.

Q. Many of the people who work there come from outside territories such as New Jersey, The Bronx, Westchester and Long Island?

A. Yes.

Q. And The Long Island serves only those commuters who live on Long Island?

A. Yes.

Q. And the major part of its traffic into the Pennsylvania station comes from Kings and Queens?

A. Yes, about 50 per cent comes from Queens. Very little comes from Kings.

Q. The growth of these boroughs has been facilitated and accelerated by improvements made at public expense such as improved highways and the rapid transit lines constructed by the City of New York?

A. Very few rapid transit lines have been constructed by the City of New York in Queens and placed in operation so far, and do not ask me about the highways, Mr. Stover. They are the worst in the world.

Q. You would admit, would you not, that The Long Island in its connection with the Pennsylvania station is only [fol. 98k-445] one of the factors contributing to the growth of Long Island and Greater New York?

A. Yes.

Mr. Gardner: He has said so twice today. The record in this case before today was full of all the statistics and of all of the extraneous facts bearing in any way on this question. And now we are trying the whole thing over and non-essentials of the principal controversy.

Exam. Sullivan: We are still wasting time by discussing it. Let us go on.

By Mr. Stover:

Q. You would say that The Long Island freight service has contributed to the growth of Long Island, would you not?

A. Yes.

Q. That freight service does not go into the Pennsylvania station and is not dependent on it?

A. No.

Q. Such effect as the Pennsylvania station has is confined to passenger traffic?

A. Yes.

Q. At the prior hearing you said that The Long Island territory had to compete with other suburban territory around New York and that the more attractive the transportation from Long Island is made, the more attractive The Long Island territory becomes as a place of residence. [fol. 98k-446] There are other factors besides transportation that enter into the attractiveness of a locality as a place of residence, are there not?

A. Yes.

Q. And in the matter of transportation there are other factors of attractiveness besides the kind of terminal?

A. Yes.

Q. You did not wish the Commission to understand that the character of the Manhattan terminal is the dominant factor in determining the attractiveness of the place of residence or of the transportation between there and Manhattan?

A. I think pretty nearly the dominant factor, yes.

Q. Did you wish the Commission to understand that people actually settle in Long Island in preference to New Jersey and Westchester and The Bronx so that they may have the privilege of riding into the Pennsylvania station?

A. I think a certain number do, yes.

Q. Do you know how large a proportion of them do that?

A. No.

Q. Is it not true that from the viewpoint of transportation facilities the Grand Central station is a better station than the Pennsylvania?

A. I would prefer not to express any opinion on that, Mr. Stover.

Q. Did you not ever hear it said that that was so?

A. Yes.

[fol. 98k-447] Exam. Sullivan: That would be mere hearsay, anyway, and of no importance.

By Mr. Stover:

Q. Do you not think it is more difficult to find your way around in the Pennsylvania station than it is in the Grand Central?

A. I do not think I am qualified to express an opinion on that, because I know the Pennsylvania intimately and much more so than the Grand Central.

Q. Do you not think that if the character of the terminal was an important factor that the advantage in the competition would be with the Grand Central?

A. Mr. Stover, I prefer not to express any opinion on comparative advantages or disadvantages of the two terminals.

Q. All right. You do not really think that people ordinarily select their homes with reference to the kind of a terminal that they use in Manhattan, do you?

A. It is more the location and the convenience than the detailed character of it, Mr. Stover. A person having business, their office in the vicinity of 34th Street would select Long Island rather than Westchester. A person having an office in the vicinity of 42nd Street would select Westchester rather than Long Island.

Q. The Whitestone branch runs from Pennsylvania station into Queens. It serves the localities north of Flushing. You know, do you not, that those localities have not [fol. 98k-448] grown as rapidly as the localities immediately surrounding them?

A. Yes.

Q. If people were generally disposed to select their residence in order to ride into the Pennsylvania station those communities would have grown up more rapidly than the others, would they not?

A. I think Mr. Hotchner can answer that question much better than I can.

Q. Unfortunately, Mr. Hotchner is not a witness.

Mr. Gardner: He is available and he is right here.

Mr. Hotchner: I did not hear the question, but I will be complimented if Mr. Rawson says that I can do anything in the wide world, not only better than he, but quite as well.

Exam. Sullivan: Go ahead.

By Mr. Stover:

Q. One of your exhibits, exhibit 46, shows that some 50 million riders came into the Pennsylvania station with The Long Island and only about 10 million by The Pennsylvania. Why is it that the Pennsylvania station does not attract New Jersey commuters as well as Long Island and New York commuters?

A. Because The Pennsylvania has discouraged the use of the Pennsylvania station by New Jersey commuters by charging a materially higher fare into the Pennsylvania station and by running its commutation trains into Jersey City where it connects with the Hudson & Manhattan.

Q. Does a commuter from New Jersey enter Manhattan [fol. 98k-449] either by the ferries or by the Hudson tube?

A. Yes.

Q. Does not that indicate that the commuters are not particularly interested as to what kind of a terminal they arrive at?

A. They do not want to pay a higher fare to get into the Pennsylvania station.

Q. Is not the fare higher than they would have to pay on the New York Central?

A. Yes.

Mr. Gardner: That is one of the things that is a matter for the New York Central.

By Mr. Stover:

Q. Mr. Rawson, you know that I requested The Long Island to furnish certain data in this case?

A. Yes.

Q. You saw my letter?

A. Yes, I did.

Q. Did you estimate the time it would take to prepare the data called for?

A. Yes.

Q. And how long did you estimate that would be?

A. From six weeks to two months.

Q. How long a time did it take you to make that estimate?

A. I considered that, I suppose, off and on for a day before I made that estimate.

Q. You knew the request was refused?

[fol. 98k-450] A. Yes.

Q. And was it refused because the preparation of the data might have delayed the hearing?

A. Because it might have delayed the hearing?

Q. Yes.

A. And also because it would have taken a great deal of time and expense to prepare.

Q. The companies are asking for an annual increase of a million dollars at least in the rental, are they not?

A. Yes.

Q. Do you not think they would be justified in spending a little time and money——

Mr. Gardner: Not if it is wasted, not one cent.

By Mr. Stover:

Q. What is your answer, Mr. Rawson?

A. I think that the data which is already in the case is ample to permit you and Dr. Bauer and Mr. Hotchner to advance all the theories that you possibly can think of. We have got nothing there noe without getting any more in.

Q. That may be. I am not saying that it is not true. Was there any reason that motivated the refusal other than those you have stated?

A. That is all, as far as I know, Mr. Stover.

Q. There was not any discussion as to the effect of the data?

A. Not a bit, no.

Q. But you know that the Interstate Commerce Com-
[fol. 98k-451] mission has submitted no Questionnaire in this case?

A. There was a Questionnaire submitted at the beginning of the case, I think, and filled out, and that does not cover very much of this data, if any of the data, which you have requested.

Q. Are you not thinking of the Whitestone abandonment case?

A. No, in this terminal case.

Exam. Sullivan: There is a return to Questionnaire in this proceeding being filed under Paragraph 18 of Section 1, and it is here in the docket if you care to see it.

By Mr. Stover:

Q. That does not contain any of the data that we called for?

A. I do not think so.

Q. And you knew, I suppose, that it is not the practice in hearings before the Commission of this kind to introduce evidence like this?

A. Yes.

Q. And you knew that The Long Island and Pennsylvania books and records are kept in Philadelphia?

A. Some of them are in Philadelphia and some in New York.

Q. Practically all of them are kept in Philadelphia, are they not?

A. The main books are kept in Philadelphia, but a great deal of this information can be gathered from recrods here in New York. Some of it we have no record on at all.

[fol. 98k-452] Q. Did it occur to you that if this data were not produced that you may be able to get what was in effect a judgment by default in this case?

A. No.

Q. Are you willing to submit pertinent facts in this case provided they are at hand?

A. As far as I am concerned, yes.

Q. Are you willing to prepare pertinent statements provided by doing so will not delay the hearing?

A. And will not add to the expense.

Q. In your estimate as to the amount of time that would be taken to prepare this data I assume that you meant that that time would be required to prepare all the data?

A. Yes.

Q. You did not mean that every item that we have called for would take that length of time?

A. No.

Q. Which of the items called for would take the most time?

Mr. Gardner: When did you ask for this data? You waited three months. Why did you not ask for it earlier?

Mr Stover: We had to make an analysis——

Exam. Sullivan: Just off the record.

(Discussion off the record.)

Mr. Gardner: I offer in evidence a letter dated March 10, 1931——

[fol. 98k-453] Exam. Sullivan: You will not offer these originals?

Mr. Gardner: I will offer this letter and ask you to authorize a copy being marked which was sent for your files. Otherwise, I have no copy left.

Mr. Stover: I will be willing to have these copied and submitted for exhibits here if Mr. Gardner wants them in.

Mr. Gardner: I want to put them in now and I will part with my originals.

Exam. Sullivan: If you do not want the originals to come in now——

Mr. Gardner: I will put them right in. It is more important to use them now, and I will part with my originals. I offer in evidence a letter dated March 10, 1931, from George H. Stover, Counsel to the Transit Commission to Alfred A. Gardner, in I. C. C. Finance Docket No. 7308, and I hand to the stenographer the copy which Mr. Stover has been kind enough to give me, and I offer in evidence all of the subsequent correspondence consisting of a latter of March 12, 1931, from Mr. Stover to Mr. Gardner, a letter of March 13, 1931, from Mr.——

Mr. Stover: The letter of March 12, 1931, was from Mr. Gardner to Mr. Stover.

Mr. Gardner: Oh, yes. I beg your pardon. Then from Mr. Stover to Mr. Gardner March 13th and then from Mr. Gardner to Mr. Stover March 14th, from Mr. Stover to Mr. McGinty of the Interstate Commerce Commission March [fol. 98k-454] 16th, from Mr. Gardner to Mr. Stover March 17th, from Mr. Stover to Mr. Gardner March 17th, and finally from the Director Alfred E. Sweet to Mr. Stover March 18th with a copy to Mr. Gardner.

Exam. Sullivan: The correspondence described will be received as Exhibit No. 47.

(The correspondence was received in evidence and marked "Applicants' exhibit 47, witness Rawson." It is forwarded herewith.)

(Whereupon, a short recess was taken.)

Mr. Gardner: I have examined the correspondence that I have put in evidence just before the recess, and I think that the letters are sufficiently explanatory of the question and now I will ask Mr. Rawson to take up the requests of Mr. Stover one by one and tell us why it would take a long time and why we deem it to be unnecessary.

Exam. Sullivan: Very well, proceed.

Mr. Gardner: Will you do so, Mr. Rawson, please?

The Witness: Item 1 in Mr. Stover's request, we have given him the car units and wheelage of The Long Island for the years 1929 and 1930. From that he can very easily

calculate the car units and percentage of The Pennsylvania and other railroads. The monthly statement would take two or three days to prepare and I cannot see what the benefit would be in having a monthly statement of that in 1929 and 1930.

Exam. Sullivan: You say you have given those to Mr. Stover?

[fol. 98k-455] The Witness: They are included in exhibits 41 and 42.

Exam. Sullivan: All right. Before we go on, is that satisfactory now, Mr. Stover?

Mr. Stover: The first part of it is satisfactory, but the last sentence asked for monthly statements which he says it would take two or three days to prepare. We would like that very much.

Exam. Sullivan: Is it really essential to your case to have the monthly statement? Inasmuch as it seems as though almost the entire case is in on annual figures and you now have the annual figures for 1929 and 1930, would not that be adequate for your purpose?

Mr. Stover: I may say this generally, Mr. Examiner, that I personally feel that we have enough in the case already to warrant a denail of their application, but these matters are confirmatory and explanatory and supplementary to matters in the record and I think that with that in our contention would appear in a much clearer light.

Mr. Hotchner: Mr. Examiner, inasmuch as the witness has stated that it would take a matter of two days or maybe two or three days to prepare this date, in view of the very large importance of the issues, is a matter of two or three days something to argue about? On the first part of it, he said it would take Mr. Stover only a small time to make his calculations and there again with a large staff of rail-[fol. 98k-456] road hands these are detailed figures in their application, why should not the railroad make the calculation?

Exam. Sullivan: The intervenors are entitled to reasonable latitude in asking for details of figures submitted. However, unless it is absolutely necessary I do not like to put the carriers to the trouble and expense of preparing it. If it is necessary and essential then, of course, it must be done.

Mr. Stover: I am unable to state that this matter is absolutely essential. It would be helpful and would confirm we think, the conclusions which are to be drawn from the matters already in testimony, but it is not absolutely essential.

Exam. Sullivan: Under the circumstances I think we will pass that for the present at least and go on with Item No. 2.

The Witness: Item No. 2, Exhibit No. 41 brings down to take the major elements in the rental paid by The Long Island which was the first part of the request. The second part says: "There should be supplied for each year, 1911 to 1930, the total amounts in the joint account for each group of costs." I am afraid that might be rather difficult to get in the past years. It might be calculated approximately but going way back to 1911 it might be difficult to get that. I do not know how long it would take where you could find it.

Exam. Sullivan: I may say personally that I do not see [fol. 98k-457] the exact relevancy of going back 20 years for these figures for the purpose of this agreement that is now before us. Could not that be broken down to a shorter period?

Mr. Stover: We could say from 1923 on if that is the year when the present agreement went on.

Exam. Sullivan: That could be broken down from 1923 to 1930.

Mr. Stover: Better say 1922, that would indicate the year prior to that and that might have some relevancy.

The Witness: Just what do you want there, Mr. Stover? You say the total amounts in the joint account. Do you want the total made up like our exhibit 41 which just gives The Long Island proportion? That would be a pretty large order. Unless you are prepared to take calculated figures and you can calculate them yourself. I think the percentage ratios are already in the case for all of these years and you have The Long Island amounts.

Mr. Stover: It was my thought to take petitioners' exhibit 6 and the different headings there, the first of which is joint facility operating expenses.

Mr. Gardner: What is exhibit 6? It does not seem to fit.

The Witness: I think it would probably take two or three weeks at least to get those figures.

Mr. Gardner: And have they the figures for 1928, 1929 [fol. 98k-458] and 1930?

The Witness: They have them for 1928, 1929 and 1930.

Mr. Gardner: I do not think we ought to go back of that.

By Mr. Stover:

Q. Mr. Rawson, these different items in exhibit 6 represent the share of these expenses which are allocated to The Long Island?

A. Yes.

Q. I have difficulty in seeing why the total figures from which these were allocated would take two or three weeks to produce.

A. Because you would have to go back to the monthly statements. That is broken down by months. The percentages are calculated by months and the amounts are calculated by months. You do not make up the totals ordinarily for the year and that is so that you would have to go back to the different months and reassemble and calculate these totals.

Q. These proportions must have been mere allocations from totals?

A. Yes, but they are made up by months. You would have to go back to the month statements and calculate the totals from those monthly statements and add them up for each year to give you the yearly figures.

Q. Could you break down these totals appearing in exhibit 6 for the different zones?

A. No, you would have to go back to all the monthly statements and add up the amounts for each zone for each [fol. 98k-459] month of the year. It would not take *us* long to do that as it would to get the total figures that you have asked for.

Mr. Gardner: I fail to see why they cannot advance any theory they may have with respect to the measure and method of computing the compensation, I do not see why any theory is not open to them. If we keep on trying to break these things down each time we come for the underlying details we will never catch up. It will take us longer to do it each time than possibly before another breakdown and recomputation has to come.

Any possible theory that they advanced in the former hearings or that they care to advance now, that was your Honor's view, for the examiner who sat. Mr. Stover has had this agreement since December 26th. It is three months except a few days before he asked for it. His theories can be urged just as well.

That is what impressed us as soon as his request came that whatever views he and Dr. Bauer may have as to the method of establishing a measure for the compensation of trackage can be advanced. We have generally the situation and we had it in great detail. All of their theories were gone into minutely with respect to underlying figures. The situation relatively has not changed. We have now taken the terminal building out entirely and I supposed that under the criticisms of Division 4, most everything [fol. 98k-460] had been eliminated when we made the new contract to conform to those criticisms and when we took the building above the track level out, very much of what they urged was gone. To be sure, much of what we had urged was gone.

But we had to cut it out and we cut it out by just taking the building out. Originally when we had the building in they forced us to take it out. Then when we put it in we were rather concerned to take it out again. And now it is — again. If they have any theories as to how the measure was to be changed they can advance it just as well without this underlying data. Relatively, there has not been any great change, is not that so?

The Witness: Yes.

Mr. Stover: If the Commissioner please, the elimination of certain factors from this agreement has naturally shifted the emphasis which we put upon different factors appearing in the last case. In the last case we questioned generally the equity of the wheelage basis when applied to all items, taxes, interest and operating expenses. These expenses show increases from year to year but those increases may be due to one of two factors or both.

One may be an increase in the total amount of expenses per se or it may be due, largely, to a shift in the ratio of the wheelage basis. This exhibit 6 does not tell us anything about what that shift is due to. The production of [fol. 98k-461] the totals would enable us to throw light on

that point and that is the purpose for which we ask the data requested in Item No. 2.

Exam. Sullivan: Can you put in any testimony to cover that point, Mr. Gardner?

Mr. Gardner: I thought that Mr. Stover had covered it this morning. I had supposed that that was what he was doing, to ask for the possible extrinsic reasons which appeared for the possible variation from the figures, and I thought he was doing that, and I thought the explanation was very clear, and it seemed to be reasonable and plausible and in fact I thought Mr. Stover felt that way, and he has had perfect liberty to ask what conditions may have led to this, that and the other variations.

I cannot see how breaking it down and going back for years and years is going to give him any better argument for the theory which he thinks should be used here in contradistinction to one that we have used which we believe to be the theory pointed out to us by Division 4.

Mr. Stover: This morning of course, I went as far along that line as I could go with the data which was available, but the data is not available for showing satisfactorily what this steady increase in Long Island payment is due to, whether it is due to the total increase in the operating expenses or whether it is merely due to a shift in the wheelage ratio and I think that is a very important consideration in [fol. 98k-462] this case.

Exam. Sullivan: You feel that you have to have that for the entire period 1911 to 1930?

Mr. Stover: No, we have already conceded that we would take it from 1922 down to date, of which we have the last three years.

Mr. Gardner: That is two or three weeks.

Exam. Sullivan: How long will that take?

The Witness: I would say two or three weeks.

Mr. Gardner: To say nothing of the expense, and the railroads are in no position to spend anything that is not necessary, as your Honor knows. I suggest that Mr. Stover ask Mr. Rawson now further for explanations——

Exam. Sullivan: Do you think there is any possibility of bringing it out by examination of the witness?

Mr. Stover: I do not see that there is the slightest.

Exam. Sullivan: It is just a matter of cold figures.

Mr. Stover: If it is going to take Mr. Rawson two or three weeks to take these totals, I do not see how he will give them offhand now on cross-examination.

Exam. Sullivan: It has to be the figures themselves rather than the method used.

Mr. Silver: Yes.

Exam. Sullivan: The description of the method used would not suffice?

[fol. 98k-463] Mr. Stover: No.

Mr. Gardner: He has not pointed out why.

Mr. Stover: I have tried in a feeble way. These figures show on their face that there has been a steady increase in the amount that The Long Island pays. We want to know why those increased. Did the expenses themselves increase or was it merely the increase in the ratio, wheelage ratio?

Exam. Sullivan: Is not that a matter that the witness might be able to describe?

Mr. Stover: He can only describe it by giving us the total. The total would then clearly appear and it would clearly appear how much was due to the total and how much to the wheelage ratio. We would be perfectly willing to make an analysis of that data and present it, if we had the data, but it is not available to us.

Exam. Sullivan: In the event this data is submitted, would it be necessary to cross-examine this witness further on it?

Mr. Stover: I would not say that it was necessary to cross examine the witness at great extent but we would like an opportunity to examine the data and present our interpretation of it.

Exam. Sullivan: What I was thinking was that when we get through with this hearing we might close it and allow this stuff to be submitted later, and then of course, you *you* would have it available for argument in your brief.

[fol. 98k-464] Mr. Stover: Yes, but there is this other factor and that is that my witness, Dr. Bauer would speak with greater certainty if he had the data before him, the complete data before him instead of what we regard as more or less imperfect data.

Mr. Gardner: Can you not make assumptions, assume expenses have gone up for whatever reasons you choose,

and make your assumption for the purpose of your argument?

Mr. Stover: I assume that the Commission would not in cold blood be very much in favor of listening to our assumptions when the facts may be presented.

Mr. Gardner: That was done before to your satisfaction. We had this matter up before and then at the last minute they came in with a multitude of requests and it will be found in the stenographer's minutes from 148 to 248 and they finally came to the conclusion that they could advance their theories without these figures.

Mr. Hotchner: Mr. Examiner, it has been mentioned several times by counsel for the railroads with a sort of a touch of reproach that these requests by counsel for the Transit Commission were not filed immediately on the noting of this case for rehearing or the reopening of the case.

I do not think there is so very much to that because we have had from the mouth of this witness, Mr. Rawson, this morning, that they were very keen on preparation of data [fol. 98k-465] for this case about a year ago, March, and then they dropped it for a while and did not get active about it again until November or December, as evidenced by the fact that we have data for March and then a hiatus down to November and December, and so whatever reproach there may be for the Transit Commission in dropping everything to formulate its request for data; if there is anything in that, there is ten times as much force back on the railroads.

Exam. Sullivan: I think we are getting into argument on the matter as to why and wherefore, and that does not get us anywhere.

Mr. Hotchner: We did not bring it up, but counsel for the railroad did.

Exam. Sullivan: The proposition from my standpoint, Mr. Stover, is that I do not want to have to adjourn this hearing unless it is absolutely necessary and unavoidable. If we are to go on with further cross-examination on this data, an adjournment is almost unavoidable. At the same time I feel you are entitled to data which you believe is necessary and requisite for the presentation of your opposition here.

If you feel that that must be in, I will order it in, and after you get it you will then have to decide whether you wish to come back or not. It will leave us all in a very uncertain position. However, if you can use this data as it comes in and argue the matter in your brief, and later be- [fol. 98k-466] fore the Commission, if necessary, it would probably simplify things for all of us.

Mr. Stover: Mr. Examiner, it puts me in a position of some little embarrassment. As I said before, we feel——

Exam. Sullivan: That surely was not my intention, Mr. Stover. I am trying to set before you the position of the Commission and myself in this matter in endeavoring to get this matter closed as soon as we can and with the least inconvenience to all concerned.

Mr. Stover: As I said before, my feeling is that even on the record presented now this application should be denied, but if I act on that assumption and by any chance it should turn out that my assumption was ill-founded, I should continually reproach myself for not having availed myself of everything in our possible command.

In my desire to be perfectly fair to the Commission I think I would say that if this data could be furnished later and used in our brief it would be of advantage to us. It would not of course be the maximum advantage because before Dr. Bauer testifies I should prefer to have him observe as large a range of data as was available, and the method you suggest would deprive us of that privilege, but of course, it is much better than nothing. We want to be ourselves as reasonable to the Interstate Commerce Commission as we can.

Exam. Sullivan: Personally I think that would be the [fol. 98k-467] better way and therefore ask the applicant to submit the data called for in the second sentence of Item No. 2, except that it shall read, "For each 1922 to 1930, inclusive." Is that correct?

Mr. Stover: That is correct.

Mr. Gardner: Are we ready to go to No. 3?

Exam. Sullivan: Yes.

The Witness: No. 3 is the "Details of Joint Facility Operating Expenses for the Year 1930, giving the total expense under each primary account by zones, following the I. C. C. classification."

In order to get that it means adding up 12 monthly statements and that might take a week's time to do that with the limited force we have available now.

That is, those statements are not made up on the yearly basis for any division such as the terminal property. We would have to take the monthly statement and add up the figures. Station employees, we can give you in a day or two.

Exam. Sullivan: How important is that data to you, Mr. Stover?

(Discussion off the record.)

Exam. Sullivan: It will be understood that the data called for in the first sentence of item 3 will be furnished for the month of December, 1930. I take it that the data called for in the second sentence has been submitted to the [fol. 98k-468] satisfaction of counsel for the intervenors, that is, the information concerning station employees.

Mr. Stover: No.

The Witness: We can give that. For one of these months that we worked up the wages, it will not be very much more difficult to get the figures. It is a case of writing it down.

Exam. Sullivan: That is merely a detail of the other.

The Witness: Yes.

Exam. Sullivan: Very well.

The Witness: Item No. 4: "The details of the investment in terminal property as of December 31, 1930, by primary account for each zone, according to I. C. C. classification". That they tell me will take six weeks to two months to get up and bring down to date. They are away behind on the details of their investment accounts. That is, by I. C. C. primary accounts.

By Mr. Stover:

Q. How nearly down to date are you with that?

A. I do not know that we have it by the primary accounts, but as of June 30, 1928, the date we wrote in the other agreement, and this agreement where we wrote the amounts, that was compiled at that time. Whether that is grouped according to I. C. C. classification or according to some other classification I am not sure at the present time but it will give you quite a little detail as of that date.

[fol. 98k-469] Q. We will take that if we get it.

A. All right.

By Exam. Sullivan:

Q. You will furnish that?

A. Yes.

Q. That is for June 30, 1928?

A. I think that is the date. It is the date given in the agreement here. July 1, 1928.

Q. All right. Item 5.

A. The details of the taxes that enter the 1930 rental, that would depend a little on how much detail you want. The taxes as shown on exhibit- 42 and 41, we can supply in addition the taxes on the station building without any difficulty. That is set up as a separate item. In other words, the taxes that we have omitted——

By Mr. Stover:

Q. Could you give us the land on which the station building rests, the taxes on that?

A. I think we can get that. There again, Mr. Stover, I do not know just how you would divide that. I think we have the land taxes for the entire block there, that is, from Tenth Avenue to Sixth Avenue. The station building only occupies the part from Seventh Avenue to Eighth Avenue and without investigating I do not know whether it would be possible to do more than make a very rough approximation of the taxes which are applicable to the block between Seventh and Eighth Avenue and 31st and 33rd Streets. Offhand, I do not know just what shape those [fol. 98k-470] valuation records and tax records are in.

Q. Does that total area constitute one tax lot?

A. As I say, offhand I do not know. I only know to get in detail what you asked for would be a large job.

Q. We would like if you can furnish it to have the land taxes and the building taxes so that we can segregate the land taxes on which the building stands.

A. Would that be sufficient just for the station area, that is, Sixth to Tenth Avenue, without going into the details of taxes on any other part of the property?

Mr. Stover: I think it would be of value, Mr. Rawson.

Exam. Sullivan: If the tax value submitted for the prop-

erty involved in this proceeding is given, it seems to me that would be sufficient. I do not think we should go into property not involved here.

The Witness: It is all involved, but the thing I take it that Mr. Stover's main inquiry goes into, goes in the station area from Sixth to Tenth Avenue and he is not interested in the taxes on the balance of the property, that is, the tubes under the river and the Sunnyside Yard.

Mr. Stover: I am willing to waive the land assessed values, on the other zones, but I would like it on this one.

The Witness: I will see what we can find out as to this separation.

Exam. Sullivan: It will be understood that the applicants [fols. 98k-471 & 472] will submit such data relating to the taxes as they can.

Mr. Stover: Perhaps we might hold this matter in suspense until tomorrow and in the meantime Mr. Rawson can find out what he can furnish.

The Witness: I will see if the records are here in New York, I will make inquiries tonight or tomorrow morning and if they have to go to Philadelphia I will not promise to get it by tomorrow.

Exam. Sullivan: Could you 'phone Philadelphia?

The Witness: Yes, as I say, but it may mean some more digging down there, and that is all.

Exam. Sullivan: 9:30 tomorrow morning.

(Whereupon, at 4:15 p. m. March 23, 1931, an adjournment was taken until 9:30 a. m. March 24, 1931.)

[fol. 98k-473]

New York, N. Y.,
March 24, 1931—9:30 a. m.

Met pursuant to adjournment.

Appearances: Same as before.

Exam. Sullivan: You may proceed, Mr. Stover.

HOBART RAWSON resumed:

Cross-examination (continued).

By Mr. Stover:

Q. We were discussing Item No. 5 as to taxes when we adjourned last night.

A. I found that the valuation placed by the City on the land from 31st to 33rd Streets, Seventh to Eighth Avenue is $10,700,000 and that is for 1930. The tax rate is $2.70, making taxes $288,900.

On the Pennsylvania station building the valuation is $10,845,000 and the taxes at the rate of $2.70, $292,815.

Q. Is the land tax which you have mentioned all put in one tax lot?

A. Yes, that is all in one tax lot.

Q. And that the valuation was all in one lot?

A. Yes, there was an item as to the land and it says, "31st to 33rd Streets, Seventh to Eighth Avenues," and the Pennsylvania station building was another item.

Mr. Stover: That seems to be about all that they can give. [fol. 98k-474] Exam. Sullivan: It would seem so to me.

Mr. Gardner: What is the next one?

Exam. Sullivan: That will eliminate Item No. 5 from anything further to be submitted under that.

The Witness: Item No. 6, details of the charges for power for the year 1930 showing base figures according to I. C. C. classification, would be quite a job, because those figures are simply compiled monthly. It is *a* quite a long and elaborate calculation, that is, the power furnished from the Long Island City powerhouse is supplied to The Long Island Railroad for operations other than the station and for various other purposes.

Splitting that up or breaking that down is quite a long elaborate operation and to take that and combine the monthly figures for the year would be quite a laborious task.

As far as the explanation is concerned the principal reason for this increase outside of the increase due to the increased traffic was that prior to the 1923 agreement the maintenance of the power facilities, that is, the power plant and distribution system and all, were charged in the joint facility operating expenses. After 1923, when that agreement was made, it seemed to be a simpler accounting proposition to charge those all into the power account so that the power account from about that time on, I just do not know which year, included the maintenance of the power facili- [fol. 98k-475] ties, that is, the power transmission and power distribution system which formerly had been included in the joint facility operating expense.

The unit cost of power is somewhat less now than it was in 1923. The peak of our power cost — reached about in 1920, and since then they have been gradually falling.

By Exam. Sullivan:

Q. Are different rates charged for different kinds of power or different kinds of current?

A. Only in that certain current which is furnished as alternating current does not bear the transmission or the substation conversion charges or the distribution charges, whereas, the power which is furnished to the trains bears all of those charges as well as the power house charges.

By Mr. Stover:

Q. Could you give us those figures for the month of December, 1930?

A. I will try to, yes. I think we can probably get those for December, 1930.

Q. That would furnish a basis?

A. Yes.

Exam. Sullivan: It will be understood that the figures will be submitted for the month of December, 1930.

The Witness: Item 7 is a detail of direct operating charges, and I think as I explained before that was mostly the charges for the switching crews that switch the Long Island trains in the Pennsylvania station. There is no [fol. 98k-476] proration between the two companies, but they are simply direct charges mostly for labor. That can be gotten without any very great difficulty for the year 1930 if you wish it.

By Mr. Stover:

Q. It would simplify it considerably if you can confine this also to a month.

A. Yes.

Q. Will you give it for a month for The Pennsylvania and for The Long Island as well?

A. I do not know whether we can get it for The Pennsylvania or not, because that goes right into The Pennsylvania accounts. I do not know just how we can get the comparable charges or just where to stop in the case of The Pennsylvania with comparable charges.

Q. Can you make the explanation as to why there has been an increase in recent years from $82,975 in 1923 to $138,623 in 1928?

A. That is mainly due to the increase in traffic. Another thing, that as the traffic is increased there it has entailed more switching because we have had to send cars back on Long Island and other places for storage. In the earlier days before the traffic was so heavy, a larger proportion of the total cars was stored in the Pennsylvania station and sending them back had required more switching.

Dr. Bauer: Mr. Rawson, these direct charges are switching, and they are taken as The Long Island's part of the [fol. 98k-477] cost of switching operations performed by The Pennsylvania in the terminal?

The Witness: Yes, the cost of switching Long Island trains. It is simply that the men there are employed by The Pennsylvania and paid by The Pennsylvania and then their time is charged to The Long Island.

Dr. Bauer: And The Long Island reimburses The Pennsylvania for the cost?

The Witness: Yes.

Dr. Bauer: Then take the balance of the cost, that is left on The Pennsylvania, is that then thrown into the joint account, that is, prorated between the two companies on the wheelage basis?

The Witness: No, that does not go into the general account at all.

Dr. Bauer: The switching does not go into the joint account at all?

The Witness: No. That is really considered train operation and train operation does not as a rule go into a joint facility account where one company uses or enjoys trackage rights for another company, but that is paid directly by the company. It just so happens in this case for a matter of convenience and supervision that these men are carried in The Pennsylvania Railroad payroll.

Mr. Stover: I am willing to drop that item.

[fol. 98k-478] Exam. Sullivan: Take the next item.

The Witness: Item 8, the detail for concessions, to get that in detail would be quite a large order, and the thing which disturbed me a little in reading it was whether from

a competitive standpoint with these various concessionaires, we want to make public these records.

Mr. Gardner: That ought not to be done, and the Transit Commission will not expect us to do that.

Exam. Sullivan: I am wondering whether inasmuch as all of the station above the track level is eliminated in this proceeding, whether that is of any substantial importance?

Mr. Stover: The operating and maintenance expenses or 20 per cent thereof are charged to The Long Island.

Exam. Sullivan: I can see where the publication of information of that sort might cause considerable embarrassment and while it is true that a railroad company today has about as much privacy as a gold fish, nevertheless I do not think they should be made to divulge matters of that sort unless it is absolutely essential.

Mr. Victory: Speaking to that question, I would like to say that in the former proceedings there was a complete exposure made, if I may use the word——

Mr. Gardner: I object to your characterization.

Mr. Victory: I am talking now, and wait a minute.

Mr. Gardner: I do not know whether you are now en-
[fol. 98k-479] tirely talking.

Exam. Sullivan: We will correct counsel when he finishes.

Mr. Victory: In order to avoid any feeling, I will put, "Revealed"—there was revealed or there was reflected in an exhibit submitted to the Commission the results obtained from the various concessions by way of rental.

Exam. Sullivan: That was the gross rentals, however, in one item.

Mr. Victory: No, the detailed rentals containing the names of eac*j* concessionaire and the amount of rent paid, and there is no reason why that same statement or exhibit should not in this hearing be brought up to date. I will hand to you, Mr. Examiner, if you wish, a statement here that was handed in or that was submitted by the Railroad Company in the former hearing which just shows those details but of course, that is back in 1923. I see no reason why this should not be brought up to date.

Moreover, I take the point of view somewhat contrary to your Honor in this way, that the mere fact that the balance of this building is eliminated does not say that these

moneys received from these concessions should not be credited to these costs.

Exam. Sullivan: That is a matter for argument as to whether they should or not.

Mr. Victory: True. I lease a house to "A" or to "B"——

Mr. Gardner: Let us get——

Mr. Victory: One moment, I am talking, Mr. Gardner. [fol. 98k-480] You will have a chance to reply.

Exam. Sullivan: I am willing to concede your point for present purposes but it is not necessary to argue it at this time. What I would like to find out now is whether Mr. Stover stands on his request for this information. If we can ascertain that then we can decide just what we want to do.

Mr. Stover: On this particular request, of course, I take the same point of view that Mr. Victory does, namely, that the materiality of this is not governed by the fact that the station building is excluded. The rental from these concessions which is retained by the Pennsylvania we regard as mitigating circumstances to the application of the wheelage basis. They are velvet, so to speak, for The Pennsylvania. I take the view that The Pennsylvania pays a certain rental to the Tunnel Company. It reimburses itself in various ways. It is reimbursing itself from the rental of The Long Island and from the concessions and from other sources.

Exam. Sullivan: I am wondering if the gross amount of rental on those concessions would not answer your needs as well as the details. Suppose he gives you the gross for the station proper and the gross for the concessions on the exit concourse level?

Mr. Victory: I think the gross is given in the statement on page 9 of the petition. I assume that that refers solely——

[fol. 98k-481] By Exam. Sullivan:

Q. That was merely the amount credited to The Long Island under the previous agreement, the one that was rejected by the Commission. That was not the gross for the entire station, is that correct?

A. Yes, that is correct. I have the figures here on the gross. I looked those up last night and the total station

area is $1,009,000 for the year 1930, and for the East River tunnels $25,557 and for the Sunnyside Yard District, $66,-025.

Mr. Hotchner: What is the total of all?

The Witness: I do not know, but it is $1,009,000; $25,557 and $66,025.

By Mr. Stover:

Q. Could you give those figures for the stations segregated according to the different levels?

A. Yes, that could be gotten. I do not know without looking into it further whether it would be possible to segregate the news privileges. They have several stands scattered all over the station and I imagine they pay a lump sum for all of them, and whether we could segregate that to the stand located at one level and another, I do not know. We will have to look into it.

By Exam. Sullivan:

Q. It will be understood that the separation for the levels will be given in so far as it can be given and if it cannot be given for the news companies simply so state in your exhibit.

A. Very well. Do you want, Mr. Stover, what we call [fol. 98k-482] The Long Island exit concourse separate or do you want the whole exit concourse level as one item?

Mr. Stover: It would be highly desirable if there could be also a segregation on the exit concourse level.

The Witness: All right, we will try to do that.

Exam. Sullivan: That is for the year 1930?

The Witness: The year 1930, yes.

Mr. Victory: Does that include the income from comfort stations?

The Witness: All of the concessions as we call them. The rentals received from the other railroads, the Lehigh Valley pays on a car and engine basis, including everything with interest at 6 per cent. The New Haven, there is no written agreement at the present time and they just have an understanding, and their rental is based on what they pay the Grand Central.

By Mr. Stover:

Q. Can you give us the amount?

A. We can give you the total money paid by each for the year 1930 and the number of cars for each railroad.

Item 9, a statement of disposition of all parcels of land originally acquired in connection with the construction of the terminal properties. I am afraid that is a rather large order. I would have to delve through the records of the real estate department and take that up.

Q. That would take you some time?

[fol. 98k-483] A. That would take some time.

Q. How long?

A. I should say a statement like that would take at least a month and maybe longer.

Exam. Sullivan: What would be the purpose of that, Mr. Stover?

Mr. Stover: We will withdraw that one.

Exam. Sullivan: All right.

The Witness: Item 10, rentals paid by The Pennsylvania Railroad to the Pennsylvania Tunnel & Terminal Company for 1930, that should not be difficult to get and I think we can get that in a day or two, and we will just get the figures.

Exam. Sullivan: All right.

The Witness: Item 11, that is the most laborious job that you have put up to us, and that is the operating data relative to the Flatbush Terminal because no such data is kept currently. It would mean going through all of the records for the year 1930, car records to obtain the number of cars, the passengers we have, and the operating expenses we would have to go back to the time sheets and material slips to get those and even when we got it it would be more or less of an estimmate, and that I should say two months will be the least time in which that could be gotten out.

By Mr. Stover:

Q. That is for the entire year?

A. Yes.

[fol. 98k-484] Q. We are willing to confine that to one month, say December.

Mr. Gardner: I object.

Exam. Sullivan: What is the purpose of it, Mr. Stover?

What is the purpose of bringing the Flatbush Terminal into the proceeding?

Mr. Stover: We wanted to show what might be considered as a normal*ly* operating cost for a railroad of this kind.

Exam. Sullivan: Do you know that the costs of operating the Flatbush Terminal are different from the costs of operating the Pennsylvania Terminal?

Mr. Stover: We do not know.

Exam. Sullivan: It is a little bit in the nature of a fishing expedition.

Mr. Gardner: All of this is fishing, and I am speaking seriously.

Exam Sullivan: I do not agree with that. That is a matter of opinion. Let us not argue this now. I will rule that out myself.

Mr. Gardner: That seems to cover the whole list.

By Exam. Sullivan:

Q. We will go back to No. 1 again. We were a little uncertain about that yesterday, but under the circumstances and in view of the other data to be submitted, I think that can be considered from 1922 on.

A. They have got everything there except the monthly statements for 1929 and 1930 and that is simply a matter of compilation.

[fol. 98k-485] Q. That will be submitted?

A. Yes. It is a case of putting the figures down and making up the typewritten statement and so we will get that.

By Mr. Stover:

Q. Mr. Rawson, there were just a few questions that I neglected to ask you yesterday. Would you compare the kind of finish and flooring and lighting in the Long Island waiting room and concourse with that in the Pennsylvania waiting rooms?

A. The concourse is about the same in each case, as I recall. There is a cement floor and part of that Pennsylvania concourse may be this glass flooring.

Q. Do you mean you have a cement flooring in the main waiting room and concourse level?

A. The exit concourse, yes, I think that is cement and a good deal of that I think is glass.

Q. Is not there some stone and marble flooring there in the general waiting room?

A. In the general waiting room, there is, yes.

Q. And is not the wall finished up to a considerable height in stone and marble?

A. Yes.

Q. And that is not true in The Long Island waiting room or concourse?

A. No.

Q. And The Long Island waiting room is lighted purely [fol. 98k-486] by artificial light?

A. Yes.

Q. And The Pennsylvania waiting room and concourses are lighted by the glass roof and windows?

A. Yes.

Q. Large windows?

A. Yes.

Q. The general style and finish in The Pennsylvania is of a much more elaborate and expensive kind than in The Long Island waiting room and concourse?

A. Yes, I should say so.

Q. Are the walls plastered in The Long Island?

A. Yes, in The Long Island there is quite a lot of tile around the walls of the concourse and waiting room both.

Q. Do the concessionaires in the building acquire the exclusive use to a certain amount of space?

A. Yes, the store space they do, and the stands they are given a certain space where they can put their stands and display their wares.

Q. For the floor space does not the lease give them the right to say who shall use that property just like any other tenant?

A. Yes.

Q. So that if Long Island passengers or others enter upon their property they do so at the invitation of the lessee rather than the invitation of The Pennsylvania?

[fol. 98k-487] A. I suppose so, as they would to any other store.

Mr. Stover: That is all.

Exam. Sullivan: Any further questions upon cross-examination?

By Mr. Victory:

Q. Mr. Rawson, did you have anything to do with the drafting of the petition in this proceeding?

A. Yes.

Q. On page 7 of the printed petition you state an excerpt from the opinion of the Commission which reads: "To state in summary the conclusions reached from the evidence the proposed agreement imposes unreasonable terms upon The Long Island in respect of the inclusion of the entire station in the investment Zone 1." You made an attempt to meet with the views of the Commission expressed there?

A. Yes.

Q. In the elimination of the building?

A. In the elimination of the station building above the track level plus one-half the service plant.

Q. You say at page 17 of the contract: "Pennsylvania Station, Borough of Manhattan, City of New York, building above the track level", does that include the entire building?

A. That is the entire building above the track level.

Q. When you say the track level you mean just the surface of Zone 1 on which the tracks are constructed?

A. Yes, and together with the tracks and appurtenances [fol. 98k-488] which go with these tracks.

Q. And does that include excavation for the purpose of the building?

A. No, the excavation was entirely for the purpose of putting the tracks down at that level.

Q. The excavation of course, was necessary for the purpose of the building also, was it not?

A. So much of it that was below the street level, but the excavation was necessary primarily for placing the tracks on that level.

Q. The tracks could have been placed upon a higher level, could they not?

A. Not very well and obtain the suitable grades for operation under the Hudson and East Rivers.

Q. Do you remember the item of cost that was submitted in this proceeding as reflecting the cost of excavation?

A. I remember there was such an item.

Q. Do you remember that it was a little over ten million dollars?

A. It may be, yes.

Q. You have assigned none of that ten million dollars, have you, to the building?

A. No.

Q. And yet you could not have had that building built without part of the excavation?

[fol. 98k-489] A. No.

Q. What proportion do you think of that ten million dollars represented the cost of the part necessary to the construction of the building?

A. As I said before I consider none of it was necessary to the construction of the building and that the excavation was called for by the tracks, by placing the tracks on the level where they have been placed. That level was made necessary by reason of the grades to get under the two rivers.

Q. Of course, I understand you are not a builder or an architect or an engineer. Are you an engineer?

A. Yes.

Q. Construction engineer?

A. Not construction, no.

Q. You are a railroad engineer?

A. Yes, electrical engineer by profession.

Q. I am not asking you this as an expert, of course, but do you know how far they would have to go down in order to get to a depth to excavation in order to get a proper foundation in that locality for the footings for a building such as the Pennsylvania terminal?

A. No, I do not.

Q. There never has been placed in this record the costs of the foundations of that building, is not that so, in any of these hearings?

[fol. 98k-490] A. I was just trying to refresh my memory. I think the cost of the footings is included in the building cost. I think that is my recollection. The building you see rests on columns and the columns of the building rest on footings which rest beneath the tracks.

Q. The footings are for the wall and not for the columns?

A. Oh, no. You do not span from wall to wall, they are from 31st to 33rd Streets.

Q. How far down below the curb level of the street are the footings?

A. The footings are at the track level or just a little below the track level. Just how far down below that I do not know.

Q. On the footings have been built a wall?

A. No, columns have been built on the footings.

Q. You have to have a wall to support the streets?

A. There are retaining walls built on the north side of 33rd Street and the south side of 31st Street, large retaining walls to hold the ground to the south and to the north, but those are used for retaining walls to enable the railroad to make use of the entire area at the track level for their tracks. They would be necessary whether there was a building there or not. As a matter of fact I doubt if very much of the support of the building rests on the walls. The building is between the south side of 33rd Street and the north side of 31st Street.

[fol. 98k-491] Q. As to the extent to which the building or building walls do rest upon those supporting walls, you do not know?

A. No, but I should say practically not at all.

Q. But do you know?

A. No.

Mr. Gardner: Are you asking him as an opinion?

Mr. Victory: I am asking him if he knows.

Exam. Sullivan: Let him answer.

The Witness: I do not know without studying the plans.

By Mr. Victory:

Q. You read the opinion of the Commission in this matter in the last hearing, did you not?

A. Yes.

Q. Do you recall that the Commission mentioned, if not stressed, the point that the cost of the foundations of this building were not in the record?

A. I do not remember that particular item. It may have been in there. If it was, it did not impress itself upon me.

Q. So that that question was not discussed, that is, the question in the preparation of this petition and the prepara-

tion of this case, the question of whether it would be well to submit the cost of the foundation walls for this building in this case?

A. No.

Q. You have referred to pillars that rest upon certain footings supporting the building?

[fol. 98k-492] A. Yes.

Q. Are they built inside of the building line?

A. Yes.

Q. How far in, do you know?

A. Those columns rest at frequent intervals all through the area. The excavated area extendss, as I said before, from the north side of 33rd Street to the south side of 31st Street. In other words, under the agreement with the City the railroad was permitted to make use of the area beneath these two streets and they took advantage of that to get the maximum space for the tracks and the columns of course, are all within that area.

Q. And the cost of those columns and those footings you say are included in the cost of this building?

A. Yes.

Q. You are sure of that?

A. Yes.

Q. As to the outside walls of the building, do they rest upon the walls or on columns?

A. No, they rest on columns, too.

Q. I think you said you were not certain just whether that was so or not.

A. They rest primarily on the columns. They receive some support from the retaining walls by means of beams which rest on the retaining walls which carry the streets, [fol. 98k-493] and without going into the detail of the design of the building, and all, I do not know just how much of the building walls may possibly be carried on those retaining walls but practically speaking, I should think very little.

Q. The cost of those retaining walls are not included in the cost of the building?

A. No, they are not included in the cost of the building.

Q. To what extent do these footings or these pillars on the footings interfere with a proper yard layout there for your tracks and platforms?

A. Not to any extent. They take up certain space in the platforms that I did not know that it would be necessary to—I do not know that you could say that they interferred materially with the number of tracks which can be placed there. I do know this, as I have been told, that a study was made at the time the station was built to see whether a tall building could be placed on that site and the report was that if such a building were placed on the site——

Q. This is hearsay, is it?

A. I say it is a study. This is hearsay, yes.

Q. I am not asking you for any study.

A. But it is simply an explanation of what you are asking, Mr. Victory.

Q. Just answer my question.

Mr. Gardner: You do not want it and we will not press [fol. 98k-494] it. He does not want it.

By Mr. Victory:

Q. Do you know how many pillars there are within the zone 1?

A. No, I do not.

Q. Do you know the size of them?

A. No.

Q. Continuing this quotation from the report of the Commission, you say that the former agreement was defective or disapproved or the Commission refused——

Mr. Gardner: Where are you reading from, Mr. Victory?

Mr. Victory: Page 7, this quotation in your petition——

By Mr. Victory:

Q. For the reason that it imposed unreasonable terms in relation to the inclusion of operating expenses, maintenance and taxes.

A. You left out one word, "All operating expenses."

Mr. Gardner: I think we better get the stenographer to get the record complete, if he is reading the petition and omitting a vital word.

Exam. Sullivan: The petition is in the record.

Mr. Gardner: I do not intend to have misstatements made in the stenographic minutes even if the right statement is in the record.

Exam. Sullivan: It will not affect anything.

Mr. Victory: I am summarizing and not following the exact words in this cross-examination.

[fol. 98k-495] Mr. Gardner: I notice that you are. You left out a vital word.

Mr. Victory: Not at all.

Exam. Sullivan: Let us go ahead with the examination of the witness.

By Mr. Victory:

Q. You wish the Commission, I judge from your former cross-examination yesterday, to understand that you have ascertained through a personal examination of various employees of the railroad company, the number of employees that are assignable directly to The Long Island Railroad?

A. Yes.

Q. And furthermore the amount of service of certain joint employees that may reasonably be assigned to The Long Island Railroad?

A. Yes.

Q. When was that done?

A. I say in March, November and December of last year.

Q. What period of time did you consume in March in doing it?

A. Personally I suppose I consumed two or three days to get the study started and then I checked up on it from time to time and compiled the data when it was collected.

Q. I think you stated that the result was that you found out about 20 per cent of those employees joint, and those that may be directly assigned to The Long Island Railroad, that 20 per cent of all the employees should be assigned to [fol. 98k-496] The Long Island Railroad?

A. 20 per cent of the wages paid to them. I made the distribution on a money basis rather than on the number of men.

Q. In order to get the distribution on the money basis you had to get a distribution of the men, had you not?

A. Yes.

Q. Have you your studies with you on that subject, the detailed studies?

A. I have some of them here, the notes that I made at that time.

Q. Have you your study of the number of men and the manner in which you made the study or just the result of

your study and the apportionment of the men that you assigned there?

A. Yes.

Q. May I see it?

Mr. Gardner: You have no objection?

The Witness: No. That is just a summary of the study and it is not all of the detail.

By Mr. Victory:

Q: This first page is the copy of the exhibit which you have introduced here?

A. Yes.

Q. Is that the only detail you have——

Mr. Gardner Lift the page, Mr. Victory.

Q. (continued.) —of the number of men?

[fol. 98k-497] Q. Have you not this set out of the number of men assignable to The Long Island Railroad, set out in typewritten form?

A. No, I have not.

Q. I notice in this first page of this group of papers that you handed me, the first page apparently being the only typewritten copy among them, that you have made certain changes in pencil. Can you explain that?

A. Yes, I think I explained those yesterday that in the case of the ticket agent's payroll the ticket men and the ticket sellers are employed and paid for by The Long Island. The Pennsylvania allows The Long Island $6400 a month towards the wages of those men. When that was first made up the typewritten figures gave the total amount paid by The Long Island to their men which is more than the amount than The Pennsylvania allowed The Long Island and that was then collected.

Q. Your figures have not been changed on the exhibit?

A. Yes, the exhibit is a copy of the typewritten statement as changed by the pencil figures.

Q. When did you make this change?

A. After the summary was compiled I saw that it was wrong and I made the change before the exhibit was made.

Q. Did you change the summary?

A. Yes.

Q. Where is the summary?

A. You have got it right before you.

[fol. 98k-498] Q. Did you change your working sheets?

A. No, there are no working sheets on that particular item because there was no necessity for having any working sheets as it was simply a lump sum paid by The Long Island.

Q. Do your working papers show here the number of joint ticket agents?

A. There are no joint employees in the ticket agent's force.

Exam. Sullivan: That was all covered yesterday and it is all in the record now. This is repetition.

By Mr. Victory:

Q. Do your working papers show how many were assigned to The Long Island Railroad directly?

A. No, as I have explained before, The Long Island carries their own ticket selling force on The Long Island payroll. They actually pay them a little more than The Pennsylvania allows The Long Island. I have not any record here of the number of men in that force.

Q. Can you figure or would your detail plan show whether there was 110 or not?

A. I do not know, Mr. Victory. As I say, I have not those figures here.

Q. What is the average wage of these men?

A. I think somewhere in the neighborhood of $150 a month.

Q. Are all your men assigned to the Bureau of Information joint?

A. None of them are joint. They are part of the ticket [fol. 98k-499] force. The men in the Long Island Bureau of Information are Long Island employees.

Q. That has been changed since the hearing before the Transit Commission?

A. Yes, it has.

Q. How about your station masters, assistants and clerks, how many of those are joint in your working sheets?

A. I think I testified to that yesterday. The number is not given in the working sheets. The wages are given.

Exam. Sullivan: That is all covered in the record.

The Witness: I think I made some calculation of the number or estimate yesterday.

By Mr. Victory:

Q. Of course, you could not make the calculation as to the wages without getting the number of men which were joint, those that were directly assigned to The Long Island Railroad and those that were directly assigned to The Pennsylvania?

A. You could without setting down the number. You can take the payroll, and here is a group that are all assigned to The Long Island and add up their wages without adding up the number of men.

Q. How about those that are joint?

A. The same way with those that are joint. We were working on a money basis rather than on a man basis.

Q. What percentage of the baggage agents did you assign [fol. 98k-500] for the wages to The Long Island Railroad Company?

A. As I recall it, in the case of the joint employees 6.1 per cent were assigned to The Long Island, that being the per cent of the total number of pieces of baggage handled which were handled for The Long Island.

Q. In estimating the joint baggage agents' account did you make any allowance for the character of the baggage?

A. No.

Mr. Gardner: I object to that as repetitious. That was all gone into yesterday.

Exam. Sullivan: It is all covered in the record. Everything you have gone into has been covered yesterday.

Mr. Victory: May we have a copy of those working papers?

Mr. Gardner: I object.

Exam. Sullivan: It is not in the record. They were handed to you for convenience.

Mr. Gardner: We have a great deal to furnish.

Exam. Sullivan: If counsel wishes to hand it to you, he may do so.

Mr. Victory: Is there an objection to his having a copy for me?

Mr. Gardner: I object to making a copy.

Mr. Victory: You object to serving us with a copy of that?

Mr. Gardner: Yes; I have said so several times.

Mr. Victory: Do you refuse on the ground that it would [fol. 98k-501] take too much time or expense?

Mr. Gardner: I am not making any further argument about it at all.

Exam. Sullivan: Of course, it is understood that with regard to the data that is to be furnished that copies of that data will be furnished to all parties of record.

Mr. Gardner: Oh, yes.

By Mr. Victory:

Q. Can you state the number of men assigned or employees that you assigned in the consideration of this exhibit——

A. Mr. Victory——

Q. One moment.

A. Maybe I will help you off the record.

Q. No.

Exam. Sullivan: Just one at a time. Mr. Rawson, go ahead. Off the record.

(Discussion off the record.)

By Mr. Victory:

Q. Mr. Rawson, since the last hearing has there been any actual loss in value of the investment, that is, due to depreciation?

Mr. Gardner: Do you mean since last night? What do you mean by the last hearing?

Exam. Sullivan: The hearing in July, 1929, I presume.

Mr. Victory: Yes.

Mr. Hotchner: Everybody knew except Mr. Gardner.

[fol. 98k-502] Mr. Gardner: I am entitled to know.

Mr. Hotchner: We are laboring hard to make you know.

Exam. Sullivan: Let us go on with the hearing.

(Last question repeated as recorded.)

A. No, I do not think there has been. I think the depreciation there has been very slight.

By Mr. Victory:

Q. You did not go over the building and the construction work there to determine whether there had been any observed depreciation?

A. No.

Q. Mr. Rawson, you say here in this petition that inasmuch as The Long Island is not charged with the interest and taxes of the station building, it is not to be credited with the net revenue from privileges, rents and concessions. Who is responsible for that statement?

A. I do not know who is primarily responsible for that, but in the earlier agreement which was approved by the Transit Commission in 1925 that provision was in there for that reason, and when we took out the station building in revising the agreement which the Interstate Commerce Commission rejected, we used the same policy.

Q. It was carried on right from 1923, is that correct?

A. Yes.

Q. What The Long Island Railroad has substantially under this agreement or proposed agreement is a use of a [fol. 98k-503] certain part of Zone 1 or of the building in Zone 1?

A. It has the joint use of the entire property in Zone 1, jointly with The Pennsylvania.

Q. For which this agreement is supposed to provide a fair and equitable rental?

A. Yes.

Q. A lessee usually has the right to use the leased property or the user of property for any purpose not inconsistent with that use, has it not?

A. A joint trackage agreement differs from a straight lease of a piece of property in that it provides for the joint use of the property by the parties. The joint use is a joint use. They use it in common. They are privileged to use any and all parts of it in common.

Q. And that part which is used by The Long Island Railroad Company should be, or The Long Island ought to have the right to use it for any purpose not inconsistent with a railroad purpose, should it not?

A. I think so, yes.

Exam. Sullivan: Would it not be a matter of agreement between the parties there? You have not got a lease here. You have merely the conferring of a right of operation in there. It is only an operating contract and not a lease, and the party granting the right can grant as much or withhold as much as they like. So that it would not necessarily [fol. 98k-504] follow at all if you had the same situation as where The Long Island Railroad were leasing the prop-

erty. It gets down to a question of law as to the relative effect of leases and operations.

Mr. Victory: As I look at it here, I go along with what your Honor has said, but it is stated here as a question of justice or a question of equity you might say, it says, inasmuch as The Long Island is not charged with the interest and taxes on the station building it is not to be credited with net revenue from the privileges, rents and concessions.

I do not think there is a sequitur there at all. I do not think the one follows the other. Of course, they can make any agreement they wish, but on general equitable grounds the conclusion he has there in a moral way will not follow.

Exam. Sullivan: I think that is a question for argument.

Mr. Victory: And it would not follow as a legal consequence, either.

Exam. Sullivan: I do not think that is for the examination of a witness. I think you may argue this before the Commission or in your brief.

By Mr. Victory:

Q. In exhibit No. 26 before the Transit Commission, Case No. 2692——

Exam. Sullivan: Is that in this record here also?

Mr. Victory: Not yet.

Exam. Sullivan: It is not in the record. I do not know [fol. 98k-505] what is the use of referring to an exhibit in the Transit Commission record which it not in here unless you want to refresh his recollection.

Mr. Victory: I will ask to have this paper designated Topic No. 29, Exhibit 26, one sheet, in the Case No. 2692 before the Transit Commission, marked for identifilation.

Exam. Sullivan: It will be marked for identification as Exhibit No. 48.

(The paper was thereupon marked "Intervenors' exhibit 48 for identification.")

Mr. Gardner: May I look at the paper just marked for identification?

Mr. Victory: Why, sure.

Mr. Gardner: Thanks.

By Mr. Victory:

Q. I hand you this paper marked for identification exhibit 48 and ask you to state what it shows under the heading, "Policemen and Watchmen"?

A. It shows 35 policemen and watchmen, 35 joint.

Exam. Sullivan: Are you going to bring out something in addition to what is already in on that matter, Mr. Victory? We went into that pretty thoroughly yesterday, or Mr. Stover did at least, and I think he covered that ground very fully.

By Mr. Victory:

Q. Can you state from your working papers how many of those policemen and watchmen of the 35 policemen and watchmen mentioned as joint in this exhibit 48 for identi- [fol. 98k-506] fication was considered as rendering service to The Long Island Railroad in exhibit 44?

A. No, this was way back——

Exam. Sullivan: I think the witness described that entire matter in reply to questions by Mr. Stover: He combed through that very thoroughly and it is all of record now. This is just repetition, Mr. Victory.

Mr. Victory: What is the answer?

Mr. Gardner: There is not any because the examiner says it is repetitious.

Exam. Sullivan: It is. It is not necessary to go into that.

Mr. Victory: I do not think there is any answer to the question I put.

Exam. Sullivan: Off the record.

(Discussion off the record.)

(Last question repeated as recorded.)

Mr. Gardner: I will object:

Exam. Sullivan: Sustained. It is already — matter of record.

Mr. Victory: Exception.

Exam. Sullivan: Exception will be noted.

Mr. Victory: I do not care to irritate the examiner, by pursuing further this hearing. You seem to have taken a positive position on this matter and so I will offer this [fol. 98k-507] paper marked exhibit 48 for identification in evidence.

Exam. Sullivan: What is the purpose of it, Mr. Victory?

Mr. Victory: The purpose of it is to make a comparison between the statements in this paper and exhibit 44 which has been offered in evidence here.

Exam. Sullivan: What is the effective date of that paper?

Mr. Victory: The date is July, 1924.

Exam. Sullivan: Of course, there is a difference of six years there.

Mr. Victory: Yes.

Exam. Sullivan: It may go in for what it is worth, and it will be received as Exhibit No. 48.

(The paper previously marked "Intervenors' exhibit 48 for identification," was received in evidence and is forwarded herewith.)

Exam. Sullivan: We will take a short recess.

(Whereupon a short recess was taken.)

Mr. Victory: I have here a statement which was an exhibit or a copy of an exhibit in the Transit Commission Case No. 2692, Topic No. 9, Rental of Space to Various Tenants other than Railroad Companies, Year 1923, and I would like to offer that in evidence in order to make a comparison.

Mr. Gardner: I object to that as irrelevant and too remote.

Exam. Sullivan: Have you got copies for distribution? [fol. 98k-508] Mr. Victory: I will make copies. I have not the copies here, but I will make copies and distribute them.

Exam. Sullivan: I might ask if the other parties desire copies or if they may not already have them?

Mr. Hotchner: We will waive a copy.

Mr. Gardner: I think we have it.

Exam. Sullivan: It will be received as Exhibit No. 48.

(The statement was received in evidence and marked "Exhibit No. 49, witness Rawson." It is forwarded herewith.)

Exam. Sullivan: If any party does not have a copy of that and desires it, Mr. Victory will furnish it.

By Mr. Victory:

Q. Mr. Rawson, in this petition on file with the Commission at page 8 there is this statement, referring to the ap-

portionment of the operating expenses to the Terminal, and you say, "This treatment of the terminal building above the track level seems to petitioners simpler and better than the complicated method suggested by the examiner for determining the apportionment by a ratio based on the exit concourse level compared to the whole of the building above the track level." Will you state what you found complicated in the method suggested by the examiner?

A. To my mind it was very difficult to determine the proportion of one level of a building to the whole of the building particularly in the case of the Pennsylvania station [fol. 98k-509] here where the levels are broken, that is, there is hardly a single level which covers the whole area.

Q. Would that necessitate the obtaining of the cubic or the square feet or both on each level?

A. That of course, is a matter of opinion as to how you would do that, as to whether the preferred method would be by calculating the square feet or cubic feet or something else or determining the relative value of the second level or the third level or the fourth level of the building. They might all have different relative values so that it seemed to us very complicated.

Q. That is rather begging the terms. You say, "It seemed to us." Do you mean it seemed to you?

A. It seemed to me and my associates with whom I consulted on the proposition.

Q. Did you make a special study of the proposition to determine whether it could be done?

A. Yes, we made studies to determine whether it could be done and what the result would be, and as I say there are various theories which were advanced by different members of our company who were considering the matter with me that might be used in determining what the proportionate value of one level in a building was.

Q. And the result of those studies did not seem quite satisfactory as far as the apportionment of the expense was [fol. 98k-510] concerned?

A. The result of the studies showed a greater proportion chargeable to The Long Island than the method we used.

Q. And what apportionment did it show?

A. The figures were made on a square foot basis and showed about 32 per cent of the total square feet area of

the building on the exit concourse level. On the cubic basis about 25 per cent of the total cubic volume of the building was comprised in this exit concourse level.

Q. Do you recall that you gave in the last hearing before the Transit Commission in Case No. 2692, that you made up a statement showing cubic and square feet of offices, facilities and rental occupancies, Pennsylvania Station, New York?

A. We made up so much data that I do not know just what that particular sheet was.

Q. I will show it to you.

A. Yes, I remember that sheet.

Mr. Gardner: And what is it designated, because this is a hearing before the Transit Commission now that counsel is referring to.

The Witness: This is a statement showing cubic and square feet of offices, facilities and rental occupancies, Pennsylvania station, New York.

Mr. Gardner: Is it marked as an exhibit, Mr. Rawson?

The Witness: It is marked here as Topic 32 and Exhibit 52.

[fol. 98k-511] Mr. Stover: Is the case given?

The Witness: Case No. 2692 of the Transit Commission.

Mr. Victory: I offer this in evidence.

Mr. Gardner: We have no objection.

Exam. Sullivan: It will be received as Exhibit No. 50.

(The statement was received in evidence and marked "Exhibit 50 witness Rawson." It is forwarded herewith.)

By Mr. Victory:

Q. Mr. Rawson, could you not have readily from that exhibit made up a determination and apportionment of cost according to the plan stated by the examiner?

A. No.

Q. Why not?

A. As I said before, I do not know how to estimate the value of the exit concourse level in this building or the portion of the value to the whole building, or the portion of the cost of the whole station that should be apportioned to the exit concourse level.

Q. Did the master's report say, "Value"?

A. I do not know whether it said cost or value, but either one I do not know how to proportion the proportion of cost of the exit concourse level.

Exam. Sullivan: It will be understood that so far as exhibit No. 50 is concerned, all parties of record have copies. If not, and they are desired, Mr. Victory will furnish them.

[fol. 98k-512] By Mr. Victory:

Q. Will you state what your studies show as to what will be added to each commutation ticket coming into The Pennsylvania Railroad Company if this agreement is approved?

By Exam. Sullivan:

Q. Have you made such a study?

A. No, I did not take it that anything will be added. It has nothing to do with the commutation revenue or the cost of the commutation ticket.

By Mr. Victory:

Q. This new agreement will be an added burden to The Long Island Railroad Company, will it not?

Exam. Sullivan: That is a matter of argument, is it not?

Mr. Victory: Maybe I jumped at the question a little previous.

Exam. Sullivan: The record itself shows that under this plan the rental probably will be increased. Whether it will be an added burden, however, I think is a matter of argument. It may be and it may not.

By Mr. Victory:

Q. Is there proposed any additions or betterments to the properties of The Pennsylvania Railroad, formerly that of the Pennsylvania Terminal Company if this agreement is approved?

A. As far as I know there are no additions and betterments which hinge on the approval or disapproval of this agreement, the carrying out of which is dependent on the [fol. 98k-513] approval or disapproval of this agreement.

Q. It is not possible now to augment the service of The Long Island Railroad Company into the Pennsylvania Terminal, is it?

A. On the expenditure of a great many millions of dollars in changing the terminal. That was all gone into in the case before the Public Service Commission and the Transit Commission in the service on The Long Island Railroad.

Q. Has the service through the tunnel into the Pennsylvania Terminal increased since 1925?

A. Yes, a great deal.

Q. To what extent?

A. I do not recall offhand. The exhibits in the case will show the relative number of cars in the two years.

Q. And the relative number of passengers?

A. Yes, also.

Q. What exhibit?

A. I have not got them before me.

Q. Not in this case?

A. Yes, in this case that were put in previously to today in the earlier hearings.

Mr. Hotchner: Do you mean yesterday?

The Witness: No, I mean——

Mr. Hotchner: You mean in the original hearings in this same case?

The Witness: Yes.

[fol. 98k-514] Mr. Hotchner: Before the Interstate Commerce Commission?

The Witness: Yes.

By Mr. Victory:

Q. Those were over a year ago?

A. Yes.

Q. They have not been brought up to date?

A. Yes, we have given you in these exhibits that I put in yesterday the number of Long Island cars and the number of Long Island passengers for 1930.

Q. It was testified at the last hearing that the Long Island terminal capacity had reached its limit.

A. Yes.

Q. And there has not been any change in that since?

A. We have been able to increase the service by adding one car to each train in the rush hours where required. We

have increased the length of train from 11 to 12 cars and that is as far as we can go with the present facilities.

Q. Any further change that would bring about an extension of the service would have to come through the construction of new tubes?

A. Except for the possible increase in the length of trains to 15 cars. You may recall the Transit Commission ordered the Railroad to change the facilities at Pennsylvania station so as to accommodate 15-car trains. That is a matter that I understand is now before the Courts for review.

Q. The claim is made by The Long Island Railroad Com-
[fol. 98k-515] pany and the controlling company, The Pennsylvania, that it is impossible to bring about that change.

A. No. The claim is made that it costs too much, that the expenditure is not warranted.

Q. Is it admitted that as an engineering matter of a railroad matter that it can be done?

A. Yes.

Q. What is the added expense as estimated?

A. Something like $15,000,000, I think.

Q. And of course, The Pennsylvania Railroad is not going to make any such expenditure as that?

A. I would not say that.

Q. Of course, you are not in a position to say what is in the minds of the Board of Directors of The Pennsylvania or The Long Island?

A. No.

Q. Since the last hearing has extra policemen been put on the platforms of The Long Island Railroad to prevent accidents to commuters?

A. I do not know when those patrolmen were put on there. They have been on there for several years and just when they were put down on those platforms I do not recall.

Q. I said extra policemen.

A. The patrolmen have within the past few years, just when I do not know, since the crowds became greater, been
[fol. 98k-516] put on the loading platforms to prevent as far as possible undue congestion in the loading of the trains and to keep the people moving. Just when that was done I do not know.

Q. Have there been any fatal accidents on the commuter trains since the last hearing?

A. So far as I know there have not.

Q. Do you travel by The Long Island?

A. Yes, I travel every day on The Long Island.

Q. Did you ever see the 5:47 going out to Hempstead?

A. I do not recall that train. I go out to Bayside on the North Shore. I know those trains very well, but some of the others I am not so familiar with.

Q. Has the company a record showing the number of passengers in any period of 24 hours using the Pennsylvania terminal platforms for Long Island commuters?

A. Those records were made and introduced into this Public Service and Transit Commission Investigation Case that I spoke of a few minutes ago.

Q. Are they based upon the number of tickets sold?

A. No, that was a count of the passengers in the trains.

Q. The figures shown on exhibits 41 and 42 exactly correspond with the figures shown under Paragraph 3, page 9 of your petition, do they not?

A. They may not. The figures of the petition were rounded out, whereas, these in 41 and 42 are more accu- [fol. 98k-517] rately computed. There may be a difference of a few dollars.

Q. Do you wish to change the figures in your petition so as to correspond to your exhibit and to conform to the proof in this case?

A. That is for Mr. Gardner to say.

Mr. Gardner: This petition was December 23, 1930. I suppose that since then the actual figures have been available.

The Witness: These figures were for 1928 for the purpose of the petition and we simply made the calculations approximately, whereas, when we came to compile these exhibits for introduction in the case we made more accurate computations and that is all.

Mr. Gardner: And both are now on the record?

The Witness: Yes.

Mr. Gardner: We do not want to change anything.

By Mr. Victory:

Q. Mr. Rawson, if this agreement be approved what would be the added expense on The Long Island Railroad Company over the previous period for the year 1930?

A. For the year 1930 if the proposed agreement had been in effect the added expense to The Long Island Railroad would have been $1,012,000.

Q. And about over how many tickets would that be spread?

Mr. Gardner: I object to that, how is it to be spread over tickets? It is too indefinite and too speculative and too irrelevant.

[fol. 98k-518] Mr. Victory: He might say he does not know.

By Exam. Sullivan:

Q. Do you know?

A. No. It is very easy to estimate how much that would be per passenger if that is what Mr. Victory wants.

Mr. Victory: Yes.

Exam. Sullivan: That can be worked out from the data here.

The Witness: Yes.

Mr. Victory: Not the exhibits in this hearing.

The Witness: Yes, the exhibits here. You have the number of passengers on The Long Island in 1930 using the station and the amount of money, and it is simply a matter of division.

By Mr. Victory:

Q. For this $1,012,000 additional expense, of one year, what additional benefits are The Long Island passengers to get?

A. None whatever.

Q. Does Exhibit No. 46 refer to the number of passengers using the station?

A. Yes.

Q. During the year 1930?

A. Yes, the number of passengers entering and departing.

Q. Regardless of the kind of ticket?

A. Yes. That is taken from the counts made on the trains by the trainmen.

Q. What proportion of that 54,203,239 passengers using the Pennsylvania station in the year are commutation passengers?

[fol. 98k-519] A. I do not recall offhand.

Q. Approximately?

A. I should say between 60 and 70 per cent.

Q. Nearer 70 per cent, is it not, as it has been testified in other cases?

A. I do not recall now, but I am just making a rough calculation here.

Q. And what is the additional charge on each commutation ticket for entrance into the Pennsylvania terminal?

A. $2.20 and that is for each 60-trip commutation tickets and that includes the additional haul from Long Island.

Mr. Hotchner: Long haul from what part of Long Island?

The Witness: The additional haul really from the East River.

Mr. Hotchner: From the western end of Long Island or Long Island City?

The Witness: The easterly side of the East River.

By Mr. Victory:

Q. In the last hearing before the Interstate Commerce Commission you gave the figure of 48,540,923 passengers entering the station and that is in 1928. Is that figure comparable to the 54,203,239 passengers mentioned in Exhibit No. 46?

A. Yes.

Q. And do you know whether that is a substantial increase in the commuting passenger or in the regular passenger?

[fol. 98k-520] A. I should say that that is practically all an increase in the passengers using the commutation tickets.

Mr. Victory: That is all.

Exam. Sullivan: Mr. Hotchner.

By Mr. Hotchner:

Q. Mr. Rawson, yesterday in your direct examination I believe you made reference to a complaint of somebody on behalf of The Long Island Railroad to the effect that The Long Island Railroad was not getting proper service from The Pennsylvania at the ticket offices of The Long Island Railroad Company; is that right?

A. Yes.

Q. Who made the complaint on behalf of The Long Island Railroad?

A. I think that originated with the passenger department, the General Passenger Agent.

Q. And was that complaint in writing?

A. I could not say.

Q. How did you hear of it?

A. I heard of it when they discussed ways and means of putting a separate Long Island ticket force in those ticket offices that would be independent of The Pennsylvania force.

Q. And up to that time the ticket force handling the tickets of The Long Island Railroad in The Long Island Railroad part of the whole Pennsylvania terminal, they were employees of The Pennsylvania Railroad?

[fol. 98k-521] A. Yes.

Q. And as a result of this complaint there was a shift and then they became employees of The Long Island Railroad, is that right?

A. Yes.

Q. What was the tenor of the complaint?

A. The tenor of the complaint was that the positions in The Long Island ticket offices were paid at a lower rate than the positions in The Pennsylvania offices and that therefore the new men were all put down in The Long Island offices and the men who became more experienced and required seniority and was promoted, he would go to The Pennsylvania and for that reason they were not giving as good service as they might.

Q. You felt the complaint was justified?

A. I did not look into that part at all, Mr. Hotchner. I had nothing to do with it.

Q. You are just reporting the fact?

A. Yes, as I heard it. As I say, I was brought into it as to its effect on this agreement.

Q. And in any calculation as to the cost of operating and maintaining the station terminal and in reporting the figures to the original hearings before the Interstate Commerce Commission was due consideration given to the fact that as a general thing the ticket employees in The Long Island side were on a lower level than the ticket employees [fol. 98k-522] on The Pennsylvania side?

A. Yes, the facts were given.

Exam. Sullivan: Do you mean physically or officially on a lower level?

Mr. Hotchner: Morally, spiritually, intellectually—off the record.

Mr. Gardner: Let us get it on the record.

Mr. Hotchner: Then on the record, when I am referring to the level I am referring to the level of the salaries.

Exam. Sullivan: There has been testimony here with respect to the levels of the station and I wanted to get that straight.

Mr. Hotchner: I am rounding out the use of the word, "Level", you will observe. Will you kindly answer the question?

Exam. Sullivan: Will you please repeat it?

(Last question repeated as recorded.)

By Mr. Hotchner:

Q. I will add to my question, when I speak of lower level I mean salary level in the way that you used it before.

A. The facts were presented as to the amounts of money charged to the different accounts.

Q. That is just what I am getting at, Mr. Rawson. We have not before us at the moment any exhibits that you might have prepared, and I am now taking a moment to search into the propriety of the methods that you may have [fol. 98k-523] used. In other words, did the figures so far as you recall that you may have presented, portray or reflect the fact that the employees on The Long Island side in the ticket department were working at a lower salary level than the employees doing similar work on The Pennsylvania side, or perhaps in contrast to that method, did you group all the employees doing certain work and then cut an arbitrary line somewhere without having the fig-

ures disclosed that the cost of doing the work, the actual cost of doing the actual work on The Long Island side was thus lower than on The Pennsylvania side?

A. I think exhibits 43, 44 and 45 that were introduced yesterday are the first time that such information has been in this case before the Interstate Commerce Commission.

Q. Is it your opinion therefore, and do you so testify, Mr. Rawson, that at the previous hearings in the original sessions of this case, there were no figures presented as to costs of maintenance and sums paid out to employees of the Pennsylvania station?

A. I think that that is the case. The totals may have been given but I have forgotten, but there are no details such as we have presented today.

Q. What is your recollection as to the method of preparing those figures or totals, as you call them, and any use that was made by you of those figures in portraying the conditions and the cost of operations?

[fol. 98k-524] A. As I recall there was no use made of them.

Q. There was no use at all?

A. No.

Q. When you were testifying yesterday and speaking of the police department payroll, you stated, did you not, that you had come to the conclusion that with regard to police department employees their work enured one-third to the benefit of The Long Island and two-thirds to The Pennsylvania Railroad; is that a correct statement of your testimony?

A. Yes, those that were jointly assigned, where we could not definitely assign a man to one railroad or to the other railroad.

Q. And I believe you stated in answer to Mr. Stover's questions that your method in collecting your data on this phase was that you would ask the employee, discuss it with the particular employee, is that correct?

A. With the supervising officer and I picked the captain or inspector of police, the man who had charge of the policemen or watchmen at the station in that particular case.

Q. And I believe you testified yesterday that the person with whom you so spoke in collecting your data did not know the purpose of your inquiry?

A. I did not tell him. I said I wanted the facts.

Q. You did not listen to my question. I asked you if you did not so testify yesterday.

[fol. 98k-525] A. I may have. I do not remember my exact testimony.

Q. Would not that be correct, that he did not know?

A. I say I did not tell him.

Q. You did not tell him?

A. He may have inferred it from some of the questions or he may have gotten the information somewhere else.

Q. Would you please tell us in what form you put the question to him? Did you put it in some such form as this: "Please tell me, with regard to your services and the services of those in the joint facility department, what portion of your time goes to the benefit of The Long Island and what portion to the benefit of The Pennsylvania?

A. Somewhat along that line, I do not remember the exact form of the question.

Q. It was just a very short conversation?

A. No, I spent some time going over the question and the man who was working on it with me spent a great deal more time on it. He spent several days.

Q. Has there been any considerable increase in the number of employees assigned to work exclusively for The Long Island Railroad in the terminal since the original hearings in this case before the Interstate Commerce Commission?

A. No, not as far as I know.

Q. There has, however, has there not, been quite a substantial increase in the traffic of The Long Island Railroad?

[fol. 98k-526] A. Yes.

Q. But there has been no proportionate or commensurate increase of employees?

A. I do not think so, no.

Q. And your statement that there has been no proportionate or commensurate increase of employees is based upon information that is pretty recent?

A. It is just my recollection of the situation. We have made the detailed study in three months of this year, March, November and December, and I just say I am drawing on my recollection what the situation was back a couple of years ago when the case first was up.

Q. You were discussing yesterday the matter of time put in services rendered and division of salaries of em-

ployees in connection with the announcement bulletin board of incoming trains. You remember that general discussion yesterday, do you not?

A. I think that those particular employees are on the station master's force.

Q. It is a fact though, is it not, Mr. Rawson, that there is no announcement bulletin board of incoming trains so far as The Long Island trains are concerned?

A. The Long Island trains are announced the same as The Pennsylvania, on the same bulletin board.

Q. Where is that bulletin board, right in The Pennsyl- [fol. 98k-527] vania side?

A. Yes.

Q. And about how many trains of The Long Island Railroad are regularly shown on that bulletin board? They are very few, is not that so?

Mr. Gardner: Are you testifying?

Mr. Hotchner: I am asking a question and not you, Mr. Gardner.

Exam. Sullivan: Leave it to the witness to answer. Do not put——

Mr. Hotchner: I will give you a little phonograph.

Mr. Gardner: I object to counsel saying that. We are here in serious litigation and I think there is no justification for saying he will give me a little phonograph. He asked the question and he put the words in the witness's mouth and then he becomes flippant about it.

Exam. Sullivan: Will you answer the question, please?

A. There are a large number. You go down there any time of the day——

Mr. Hotchner: Just a minute, Mr. Rawson.

Mr. Gardner: Now, can he answer?

Mr. Hotchner: I do not know whether he can, but he may.

Exam. Sullivan: What is your point?

Mr. Hotchner: My point is this, before we leave the other point, and I do not want to make much of an issue out of [fol. 98k-528] this, I think under cross-examination I have the right to direct the witness's attention to a certain theory, and to point my question.

Exam. Sullivan: We will grant all that. Do not lead the question too strongly. I am willing to grant reasonable

latitude of course. The question has been answered, I believe.

Mr. Gardner: No, he was cut off. Counsel broke up into an harrangue when the witness was half through with the answer.

(Last answer repeated as recorded.)

A. (continued). —and you will see half a dozen or more Long Island trains posted on that board, the time of arrival and whether they are on time or not. Just what the proportion of the number of Long Island trains are posted on that board I do not recall at the present time.

By Mr. Hotchner:

Q. When you say half a dozen, do you mean that I can go there at any hour of the day and see at any hour of the day a half dozen Long Island incoming trains noted, or do you mean that during the whole day half a dozen trains are noted?

A. I say you can go there any hour of the day and see about half a dozen incoming Long Island trains due to arrive within the next hour.

Q. Have you ever noticed at one time a half dozen in- [fol. 98k-529] coming Long Island trains noted?

A. Yes.

Q. Can you call off some of the trains, The Long Island trains I am talking about, that are noted on that board?

Mr. Gardner: I object to that as irrelevant.

Exam. Sullivan: It is largely irrelevant, but the witness if he knows, can answer.

A. First, I know they have the long distance trains, Montauk, Greenport, Patchogue, Babylon, Oyster Bay, Hempstead, and I do not know just how many more, but I know they cover that number.

By Mr. Hotchner:

Q. And that is notwithstanding the fact that a few minutes ago in response to Mr. Victory's question you stated that from 60 per cent to 70 per cent of the passengers arriving in the Pennsylvania station are commuters?

A. I do not see what that has to do with it.

Q. It makes no difference whether you see, but I am putting you a question.

Mr. Gardner: And he is answering it.

By Mr. Hotchner:

Q. That is the best answer you want to give?
A. Yes.
Q. That you do not see what connection there is?
A. No.

Mr. Gardner: And nobody else.
[fol. 98k-530] Mr. Hotchner: Mr. Gardner is answering for the whole world. I object to Mr. Gardner intervening. We are the intervenors and I will not let him intervene, and my purpose in making this statement is this, that I had no right to object during the time that Mr. Gardner objected to all of the counsel, and I want to call attention to the fact here that never during Mr. Gardner's examination yesterday did any of the counsel once interrupt him. He constantly has interrupted us.

Exam. Sullivan: Just a moment. If any counsel desires to object to a question, I want them to object in a straight objection, and eliminate all this additional comment and keep away from personalities and exchange for personalities. There is no necessity for that at all.

Mr. Hotchner: Thank you. I ask that hereafter Mr. Gardner address his remarks to you and not to me.

Exam. Sullivan: I will take care of that. Go ahead with your cross-examination.

By Mr. Hotchner:

Q. The matter of the elevator men and the division of their salaries, Mr. Rawson, is there an elevator on The Long Island side?

A. Yes.

Q. That is a freight elevator, is it not, and I am not facetious in that.

A. No, there is a passenger elevator there from every [fol. 98k-531] train platform to the exit concourse.

Q. What percentage of those on The Long Island side are closed up?

A. I thought they were all in operation. If they are not, it is news to me.

Q. How long is it since you, Mr. Rawson, have personally used any elevator on The Long Island side?

Mr. Gardner: I object to that as irrelevant.

Exam. Sullivan: The objection is overruled.

Mr. Gardner: Exception.

Exam. Sullivan: Exception noted.

A. I do not know, Mr. Hotchner. I do not know as I have ever used the elevator on The Long Island side. Fortunately, I have been in fairly good health and I can walk up the stairs.

Q. Just answer my question, and I will ask that the second half of the answer be stricken out.

Mr. Gardner: I object.

Exam. Sullivan: The answer will stand as it is.

By Mr. Hotchner:

Q. Then as far as you are concerned you never have used any passenger or any other elevator on The Long Island side, is that right?

A. I think not. I do not recall. It has been a good many years if I have.

Q. It has been a good many years?

A. Since I have, yes.

[fol. 98k-532] Q. How many years have you been using the station?

A. Ever since it has been opened, since 1910.

Q. So that in a period of 21 years you do not remember ever using the elevator on The Long Island side, is that right?

A. That is right.

Q. Do you remember ever seeing anybody ever use any elevator on The Long Island side?

A. Yes, I have seen them. I have seen people get out of The Long Island train and get into a wheel chair and taken up the elevator.

Q. That is just the point I was going to bring up. Cripples, in other words?

A. Yes.

Q. Certainly not in general use?

A. I think not, no.

Q. And yet you are allocating, are you not, a certain portion of the cost of running the elevators and the salaries of the elevator men on The Long Island Railroad?

A. Those men——

Q. Just answer the question yes or no.

A. Those men do other things besides run the elevator.

Q. Just a minute.

Exam. Sullivan: Let him explain the answer.

Mr. Hotchner: Let him give the answer first. Are we not entitled first to find out whether a yes or no answer [fol. 98k-533] is possible. This witness has never made a yes or no answer.

Exam. Sullivan: I would rather have the witness's explanation of his answer all at the same time. It will save time.

By Mr. Hotchner:

Q. What else do they do?

A. They circulate around and open the gates when the trains arrive and they are around the waiting rooms and concourses to answer questions of the passengers.

Q. Do they operate the elevators only when some train is expected, some important train?

A. Yes.

Q. If that is so, what important trains on The Long Island side do those men watch for and then rush back to the elevators?

A. I do not know.

Q. Those elevator men open gates, do they?

A. Yes.

Q. Just on The Pennsylvania side, is that not so?

A. Yes, where both Pennsylvania and Long Island trains come in from time to time.

Q. Then so far as The Long Island is concerned the only time they open gates is when a Long Island train comes in on The Long Island side, is that right?

A. Yes.

Q. You testified yesterday and I think you produced [fol. 98k-534] figures to confirm it, Mr. Rawson, that in 1930 the business of The Pennsylvania Railroad had noticeably fallen off, is that right?

A. Yes.

Q. But that in the period of 1930 the business of The Long Island had not fallen off?

A. Yes.

Q. Am I correctly restating your testimony, if I state that you testified that in the period of 1930 the business of The Long Island Railroad had increased?

A. I think slightly as I recall it.

Q. Slightly?

A. Yes.

Q. We are now talking of 1930 over 1929?

A. Yes.

Q. And 1929 was an increase in business over 1928?

A. Yes.

Q. And we are now talking of The Long Island only. 1928 was an increase over 1927?

A. Yes.

Q. And 1927——

Exam. Sullivan: That is already in the record by years.

By Mr. Hotchner:

Q. 1927 was an increase over 1926?

A. Yes, I recall there has been an increase every year.

Q. And my question only concerns the last few years, and I do not want to go back too far. And from 1926 to [fol. 98k-535] 1930, both inclusive, there has been a steady increase?

A. Yes.

Q. And that increase is reflected also in profits, I mean there has been an increase from 1926 to 1927, in profits, and from 1927 to 1928, in profits, and from 1928 to 1929, in profits, and from 1929 to 1930, in profits.

A. Except from 1929 to 1930, the net income from The Long Island Railroad is less in 1930 than in 1929.

Q. Are you speaking of freight income or total income?

A. The total net income.

Q. How about the passengers alone?

A. The passenger revenue showed a decided decrease in 1930 as compared with 1929.

Q. How about revenue during that period from commutation tickets?

A. I think there was a slight increase in revenue from commutation tickets. During the first part of the year

there was an increase and during the last part of the year it started to fall off, but I think the total for the year was a slight increase.

Q. So that we have it, Mr. Rawson, that so far as the commutation business, the business of the commuters, is concerned, the year 1930 is an increase over 1929?

A. Yes.

Q. And as far as commuters are concerned, the com-
[fol. 98k-536] mutation business of The Long Island Railroad is in a better condition and producing more revenue than ever in its history?

A. No, the last few months of 1930 and the first few months of 1931, the commutation business has been less than in the corresponding months of the year previous.

Q. Speaking of the year 1930 when we were making our study a moment ago that is true of the year 1930. We bear in mind that the year 1931 is barely started, but the year 1930 shows, so far as the income and profits from the commutation business is concerned, that the income during 1930 from the commutation business was bigger than ever before in the history of The Long Island Railroad?

A. The income, yes, but I do not know about the profits.

Q. The income then, will you limit the question to income——

A. Revenue.

Q. Were the expenses on the commutation business during 1930 bigger than ever before?

A. I do not know.

Q. Do you suspect that they were?

A. I think they are probably as much as the previous year, but I do not know. I have made no calculation.

Q. You testified I believe earlier today and perhaps yesterday, I just want to make sure, that your estimate is that the amount of actual increased rental that would be paid by The Long Island Railroad Company to The Penn-
[fol. 98k-537] sylvania, if this proposed new agreement is approved, is about somewhat over the sum of $1,000,000 per year?

A. Yes.

Q. Closer to $1,100,000?

Exam. Sullivan: The facts of record show that. The petition itself shows that.

By Mr. Hotchner:

Q. It is somewhat over $1,000,000?

A. Yes.

Q. The agreement under which the two roads having been working for several years, Mr. Rawson, is based on an interest payment of 4 per cent?

A. Yes.

Q. And the proposed agreement we are now considering provides for an interest payment of 5¾ per cent?

A. Yes.

Q. That would make an increase in the interest of 1¾ per cent which, according to my figures produced an increase of 7/16; is that correct?

A. I do not know what the proportion is. The amounts are shown——

Q. I am speaking of rates of interest, 4 per cent compared with 5¾ and that is an increase of 1¾. 1¾ over 4 equals 7/17, reduced to a simple fraction from a compound 1, does it not?

Exam. Sullivan: It is a matter of calculation.

[fol. 98k-538] A. Yes, 7/16.

Q. Or almost one-half?

A. Yes.

Q. And would that figure of almost one-half increase in the rate of interest be reflected in dollars, that is to say, would the increase in the rental over the present rental be about 7/16 or almost 50 per cent again?

A. Under the present old agreement the interest payment in 1930 amounted to $1,386,000, and under the proposed agreement it would have amounted to $1,979,000 and that is exclusive of any interest on the power facilities or an increase of $593,000.

Q. Please explain the difference between this figure of $593,000 and the difference somewhat over a million dollars increase. Is the difference taken care of by the item of power?

A. No, mostly in operating expenses, the 20 per cent of the operating maintenance of the station building makes up the balance with the exception of $10,000 in the power.

Q. You spoke of the increase in facilities at the Long Island station and you were testifying about that yesterday. Is it not so that so far as the waiting room and the concourse are concerned that that increase was merely the pulling down of walls, interior walls and the elimination of pillars?

A. No, a new waiting room was built to the south of the [fol. 98k-539] ticket offices.

Q. That is a very small one, is it not, that is not the main waiting room?

A. That you might say is the main waiting room for Long Island passengers where the seats are.

Q. Is it your idea that that new waiting room that you speak of to the south has taken the place of the main waiting room, a part of which is the ticket offices?

A. It is a supplemental facility.

Q. Then it is supplemental to main. A minute ago you said it was main and now you said it is supplemental.

A. The distinction is this, Mr. Hotchner, that what used to be the waiting room and the only waiting room strictly for Long Island passengers in that part of the business came between the subway and the stairways leading to the trains. In order to facilitate the passage of the large number of people through there the partition was torn out, and that was all opened up and the seats that used to be there were taken out and this other waiting room was built and seats put in that for the accommodation of people that wanted to wait and sit down in a warm place for some time.

Q. About how high is the ceiling in that waiting room from off the floor?

Mr. Gardner: I object to that as repetitious.

A. I testified to that yesterday.

[fol. 98k-540] Exam. Sullivan: That was very fully covered yesterday by Mr. Stover.

Mr. Hotchner: I think I will agree with this, that at last Mr. Gardner was right in his objection.

By Mr. Hotchner:

Q. How about windows? This new waiting room that you speak of as the supplemental waiting room, any window in it?

A. No windows to the outside.

Q. Any windows to anywhere unless you are attaching a condition to the answer?

A. Yes, windows to the ticket office.

Q. You mean where passengers can ask for a ticket?

A. Yes.

Q. Is that your ordinary conception of a window?

A. It is called a window and it is a window.

Q. I am willing to let your answer stand, Mr. Rawson.

Mr. Gardner: I submit that counsel cannot help himself.

Mr. Hotchner: Oh, yes, I can help a whole lot.

Exam. Sullivan: Never mind the argument.

Mr. Hotchner: And I have been helping a whole lot.

Mr. Stover: The Long Island waiting room is below the street level.

The Witness: Yes, it is.

Mr. Gardner: It was fully gone into yesterday.

Mr. Hotchner: It only takes a moment because it might [fol. 98k-541] lead to something. I may get an idea out of it.

By Mr. Hotchner:

Q. Mr. Rawson, but on the contrary, the Pennsylvania waiting room has big and glorious and grand windows, has it not?

A. Large windows, yes.

Q. You do not like the term grand or glorious?

A. That is a matter of opinion.

Q. What is your opinion? I am asking your opinion.

Exam. Sullivan: What difference does it make? We know that the main waiting room has windows. It is of no importance.

Mr. Hotchner: Just one point that Mr. Stover did not cover on that. He covered everything so well.

By Mr. Hotchner:

Q. The matter of decorations in the comparison of the two, the Pennsylvania has some very beautiful mural paintings on the ceiling, has it not?

A. The paintings on the walls, yes.

Q. Now about the ceiling?

A. I do not recall whether that is painted or how it is decorated.

Q. Then I suggest, Mr. Rawson, just as a devotee of art, that you go up there and look at the beautiful paintings in your own station.

Mr. Gardner: I move to strike it out.

Mr. Hotchner: Which, the paintings?

[fol. 98k-542] Exam. Sullivan: Motion granted. That is entirely immaterial.

By Mr. Hotchner:

Q. But on the contrary, the ceilings in The Long Island are just plain, ordinary drab, when they can be seen, but drab plaster or something like that, whitewash?

A. I think they are painted. As I recall it there is some attempted panelling to give it the effect of panelling in the Long Island waiting room ceiling.

Q. How long, Mr. Rawson, have you been doing the work in connection with this regulatory Commission, or cases before regulatory Commissions for The Long Island Railroad?

A. Fifteen or sixteen years.

Q. Then you have been making the studies for and representing The Long Island Railroad as its technical expert on all of the applications of these railroads for increased rentals, is that right?

A. Since 1922.

Q. That is nine years ago?

A. Yes.

Q. And before that were there any applications for increased rental so far as you know?

A. There were changes in the rental from time to time.

Q. I said applications.

A. They were accompanied by applications I think, as far as I know.

[fol. 98k-543] Q. And to what regulatory body were those addressed?

A. To the Transit Commission or its predecessor.

Q. The Public Service Commission?

A. The Public Service Commission of the First District. They had two or three names before that.

Q. I have been connected with it since 1924 and in all the hearings up to this one presented to the Interstate Commerce Commission, they were before the Transit Commission?

A. Yes.

Q. And all that you know in addition to those I have been connected with, they have also been presented to the Transit Commission or its predecessor body, the Public Service Commission of the State of New York, is that right?

A. Yes.

Q. And it was always The Long Island Railroad and The Pennsylvania Railroad that selected the Transit Commission and the Public Service Commission?

Exam. Sullivan: What is the object of going into this? We have been all through this in this record.

Mr. Hotchner: We may want to bring it up on a question of jurisdiction.

Exam. Sullivan: You have your full record to work on.

Mr. Hotchner: May I have an answer yes, and it will be in.

Exam. Sullivan: You have your entire record in this case. This is merely a supplemental proceeding in this finance [fol. 98k-544] docket and so far as your question of jurisdiction is concerned it is just as good today as it was a year ago last July when we started this thing.

By Mr. Hotchner:

Q. And you appear here on behalf of The Pennsylvania Railroad also, do you not, Mr. Rawson?

A. Yes.

Q. Then if that is so, I will ask you, so far as you know, Mr. Rawson, has The Pennsylvania Railroad ever refused to allow The Long Island Railroad trackage rights or the use of the facilities that are covered by this joint inquiry?

A. No, as far as I know it has not.

Q. Did you ever hear from any source at any time from any person that The Pennsylvania Railroad had ever refused to allow The Long Island Railroad trackage rights or use of any of the facilities in question?

A. No.

Q. One more question along that same line. Do you know whether the Interstate Commerce Commission was ever

called in by either of these two railroads to adjust any phase of the rental or any of these rights at the time of the commencement of the joint use of the facilities which I think is back in 1910?

A. I do not know.

Q. Did you ever hear anything to lead you to believe that either or both of these railroads had ever requested the Interstate Commerce Commission to adjust the rental or [fol. 98k-545] adjust the use of any of these facilities back in 1910?

A. No.

Q. You never have heard that?

A. No, I never have.

Q. And you have never heard it in any period at any time since except the period at the original of these present hearings?

A. As far as I know that is the first application that was made to the Interstate Commerce Commission.

Q. Is it not the real purpose of The Long Island Railroad asking permission to pay an increased rental to its landlord, The Pennsylvania, to form the basis of an application by The Long Island Railroad for an increase in commutation fares?

A. I do not know, Mr. Hotchner.

Q. Are you sure, Mr. Rawson, you want your answer to stand that you do not know?

A. I do.

Q. Have you talked with anybody about that phase of it?

A. Yes, and I have always understood that there was no thought in the mind of those who were responsible for this application to adjust the fares at the present time or in the near future.

Q. And when you say those responsible, who do you mean?

A. The officers of the company with whom I have discussed this application.

Q. Do you mean the officers of the companies, because I think you testified that the officers of the one are the officers [fol. 98k-546] of the other?

A. That is correct, yes.

Q. And right on that point you testified that your work, studies and observations were under the direction of the president and vice-president of both roads?

A. Yes.

Q. But your direct report is to Mr. Gardner, is it not, the assistant general counsel of The Long Island Railroad; I believe that is his title?

A. No, I worked with him in preparing the case, but reports I make as to the situation are made to the vice-president, Mr. LeBoutillier.

Q. And that is the vice-president of The Long Island?

A. Yes.

Q. And he is also vice-president of The Pennsylvania?

A. Yes.

Q. Is Mr. Gardner an officer of The Pennsylvania Railroad?

A. I do not know. You might ask him.

Exam. Sullivan: We will adjourn for lunch until two o'clock.

(Whereupon, at 12:30 p. m., a recess was taken until 2:00 p. m.)

[fol. 98k-547] Afternoon Session, 2:00 p. m.

Exam. Sullivan: Proceed, Mr. Hotchner.

HOBART RAWSON resumed.

By Mr. Hotchner:

Q. Mr. Rawson, when we took our luncheon intermission, I believe we were at the point of asking what Mr. Gardner's official connection was with the two railroads?

A. Yes.

Q. Have you ascertained if you did not know?

A. No. I say, he is Assistant General Counsel of The Long Island and I do not know whether he has any official position with The Pennsylvania or not.

Mr. Hotchner: Mr. Examiner, as long as counsel is in the room may I through you ask Mr. Gardner to state what, if any, his official position is with the——

Exam. Sullivan: Is it material?

Mr. Hotchner: I think it is.

Exam. Sullivan: In what way?

Mr. Hotchner: I will bring it out in a moment.

Exam. Sullivan: I do not see the materiality of the position of counsel in this proceeding.

Mr. Hotchner: I do not think it is anything that he need be ashamed of.

Exam. Sullivan: I grant you that, but I do not see the materiality of it on the record.

By Mr. Hotchner:

Q. But, Mr. Rawson, your official position is as an em- [fol. 98k-548] ployee on the staff of The Long Island Railroad, is that right?

A. Yes.

Q. And you have no official position nor are you on the payroll of The Pennsylvania?

A. No.

Q. Is that statement correct?

A. That is correct.

Q. Then we have it that so far as the representatives of the railroads here in active charge of this application are concerned, one is admittedly and solely an employee on the staff of The Long Island Railroad and we have no information as to the position of the other spokesman. May I ask, on the initiative of which of these roads has this application been started, The Pennsylvania or The Long Island?

A. I think the Pennsylvania.

Q. As has been brought out The Pennsylvania is the tenant of these three zones in question, the landlord and owner being the Pennsylvania Tunnel & Terminal Railroad, is that correct?

A. Yes.

Q. And the terms of the lease from the Pennsylvania Tunnel & Terminal Railroad through the tenant, The Pennsylvania Railroad, fixes a certain amount per year in dollars?

Exam. Sullivan: That was all covered yesterday also.

Mr. Hotchner: I do not think it was covered in dollars. [fol. 98k-549] Exam. Sullivan: It cannot be covered in dollars because it is covered in percentages. A certain percent on the outstanding indebtedness and a certain percent-

age on the stock so that it could not be fixed on a dollars and cents basis, that is, a fixed rental.

It would depend entirely upon the amount of funded debt outstanding. Then there may be some fixed charges in addition to that in the way of rental and there probably are. Taxes will vary.

By Mr. Hotchner:

Q. What then during the year 1930 was the sum paid in dollars by The Pennsylvania Railroad as rental to the Pennsylvania Tunnel & Terminal Railroad?

A. I do not know, Mr. Hotchner. That is one of the items which we said this morning we would look up and give.

Q. Do you know the figure for any recent year?

A. No, I do not.

Q. What is your best recollection of an approximate sum?

A. I do not recall at all. As I recall the terms of the lease it was 5 per cent on $50,000,000 of stock and some percentage on the indebtedness. Whether that is fixed or whether that varies I do not know.

Q. 5 per cent on $50,000,000 would be $2,500,000?

A. Yes.

Q. And can you give us some idea of what the remaining figure would be, the remaining element?

[fol. 98k-550] A. I think the indebtedness is something in the neighborhood of $60,000,000 and it may be 5 per cent on that.

Q. And that would be an additional $3,000,000?

A. Yes.

Q. So that a rough guess, not holding you to these figures at all, would be something over $5,000,000?

A. Yes.

Q. That includes rentals of all kinds?

A. In addition to that The Pennsylvania pays all of the taxes and operating expenses and that rental is really the interest or return on the investment.

Q. So whatever increased rental is provided by this new proposed agreement under discussion now, that, if paid to The Pennsylvania Railroad by The Long Island, would be a substantial reduction, would it not, to the net payments or obligations by The Pennsylvania Railroad to the Pennsylvania Tunnel & Terminal Railroad?

A. The payment by The Long Island goes to The Pennsylvania Railroad as tenant and operator of this property.

Q. Then your answer to my question, reduced to one word, is, "yes"?

A. I think as a matter of fact your question——

Exam. Sullivan: The point is that The Pennsylvania Railroad would have that much more money available to pay its own rental after it received its charges to The Long Island.

[fol. 98k-551] The Witness: That is it.

By Mr. Hotchner:

Q. Then we will not argue on the question as to whether a sum of $1,100,000 is substantial or not, and we can agree that that is a substantial sum?

A. Yes, and that would go to The Pennsylvania Railroad.

Q. And in addition to whatever increased rental that The Long Island Railroad might be asked to pay plus the rental that it is now paying, in addition to that there would be the sum that it receives from the other railroads that are subtenants of The Pennsylvania, is that right?

A. Yes.

Q. Being the Lehigh Valley and the New Haven Railroad?

A. Yes.

Q And that is all?

A. That is all.

Q. B. & O. is no longer there?

A. No.

Q. There are no others than The Long Island, the Lehigh Valley and the New Haven who are subtenants of The Pennsylvania Railroad?

A. That is right.

Q. Have you any idea, Mr. Rawson, what would be done with this increased rental, if any, outside of what you have already stated, that it would go to the coffers of The Pennsylvania Railroad?

[fol. 98k-552] A. No, I have not.

A. And I think you stated this morning that so far as you know there are in contemplation no claims for additional facilities pointed particularly to the convenience of The Long Island patrons?

A. No, that is not what I said. I said that there were no plans for facilities which were dependent upon The Pennsylvania receiving the increased rental.

Q. Or to put it in another way, so far as you know—I will withdraw that. Will you state, Mr. Rawson, whether you know of any reason outside of forming the basis for an application for increase in commutation fares or other fares on The Long Island Railroad, what advantage or reason there is for this application to increase this rental in so substantial a sum?

Mr. Gardner: I object to that as assuming facts not proven. The form of the question assumes something that was not testified to.

Exam. Sullivan: I do not know just how the question will hook up with what we have here. As I understand it, The Pennsylvania is contending that the rental they are now seeking is a reasonable rental and desire to establish it for that reason. It is immaterial what they may have in mind to do with the money so long as they feel that they are getting an adequate return for the facilities that they are [fo 98k-553] placing at the disposal of The Long Island.

Mr. Hotchner: My answer to that, Mr. Commissioner, is this, that in every law suit, and this is in some form a law suit, and with regard to every application, in every department of thought or activity, motive is a very important thing to inquire into.

Exam. Sullivan: There is the motive of the applicant. As I understand it in this case it is to secure adequate return for the facilities they are furnishing. They feel that what they are receiving now is lower than a just and reasonable return. Is that the situation?

Mr. Gardner: Yes, precisely.

Mr. Hotchner: That is the superficial reason given.

Mr. Gardner: Fundamental reason given.

Exam. Sullivan: It is the only basic reason given.

Mr. Hotchner: Whether we say superficial or basic it is only selecting a term. Our view is this, Mr. Examiner, that this is purely a matter of bookkeeping and as has been stated many times, so I do not claim to add any novelty at all to the claim; it has always been claimed that The Pennsylvania owning practically all of the stock of The Long Island Railroad Company, that it does not really make any difference so far as income is concerned, actual income,

whether the rental is $1,100,000 a year more as provided in this new agreement or less, so that there must be some-
[fol. 98k-554] thing more than a mere attempt to adjust bookkeeping or values. I am searching for motive. Of course, we have a certain theory as to the motive and I think it is of real importance to establish that motive. We claim it is merely taking from one pocket and putting it in another.

Exam. Sullivan: Wait a moment, now. I will allow the witness to answer your question as to any other motive if you will so desire.

Mr. Hotchner: I do.

Exam. Sullivan: It will probably end the argument on it. What can you say as to that, Mr. Rawson?

The Witness: The only motive that I know of is that The Pennsylvania wishes, as the examiner has well expressed it, to earn a fair return on this property, on the use made of the property by The Long Island and The Long Island has felt that it could not very well object to paying a fair return.

In other words, it should stand on its own feet, that its operations and its operating expenses among which is the item of rental paid to The Pennsylvania, should adequately and properly reflect the cost of its operations.

By Mr. Hotchner:

Q. Now, Mr. Rawson, can you imagine or can you state any benefit to The Long Island Railroad as a corporation or to its patrons as travelers that might flow through The Long Island paying an additional sum of over a million dollars a year as rental for these same facilities at Penn-
[fol. 98k-555] sylvania station?

A. There is this advantage in that if The Long Island is paying a fair and adequate rental for the use of the facilities it is in better shape to ask The Pennsylvania to furnish additional facilities as needed if they can be furnished. As long as they are not paying an adequate rental they cannot so very well ask for more in the way of facilities.

Q. And you stated earlier in the day, did you not, that certain improvements that had been suggested by somebody or some Board or originated somewhere, were turned down because the improvements in question would involve the expenditure of the sum of abost $15,000,000?

A. Yes.

Q. You spoke this morning of the fact that the number of cars per train had been increased from 11 to 12 and you cited that as one of the instances or perhaps the only instance, I do not know which, of an improvement in facilities or service on The Long Island Railroad. As a matter of fact that increase from 11 to 12 cars per train was ordered by the Transit Commission and the Public Service Commission after extended hearings; is that right?

A. No. They ordered an increase from 11 to 15.

Q. And The Long Island Railroad objected strenuously to any increase?

A. They said they would increase from 11 to 12 and they [fol. 98k-556] have increased from 11 to 12.

Q. You were a witness at those hearings, were you not, Mr. Rawson?

A. I have forgotten whether I was a witness. I know I was present at the hearings and I may have been a witness too.

Q. And it is not your memory then that The Long Island Railroad was brought into these hearings on order of the two regulatory bodies of New York, the Transit Commission and the Public Service Commission, and it was only on the order of these Commissions that the number of cars per train on The Long Island was increased from 11 to 12?

A. That was not my recollection or understanding. My recollection is that the increase from 11 to 12 was a voluntary act on the part of the Railroad. They objected to an increase beyond 12.

Q. Was the order of the Commissions directed to The Long Island Railroad to increase from 11 to 15, and that thereupon The Long Island Railroad consented to that part of the order by increasing from 11 to 12 without further contest, but that as to the increase from 12 to 15 The Long Island Railroad has taken the matter to the courts and has not yet made the increase and is fighting that issue out in the courts; would that be a correct statement?

A. No, I do not think that is a correct statement. It is my understanding that the Commission ordered the trains [fol. 98k-557] to be increased to a maximum of 15 cars. They said nothing in their order about any increase from 11 to 12 cars.

Q. I agree with that, and I did not intend to give that impression in my question. I specifically and carefully intended to say, even if I did not, that the Commission ordered

the increase from 11 to 15, but that your railroad had agreed finally to increase finally from 11 to 12, but has contested the increase from 12 to 15, is that a correct statement?

A. I think just a matter of understanding.

Exam. Sullivan: I think the witness has explained that fully heretofore. We are threshing over the same ground and we are getting nowhere.

Mr. Hotchner: I think that is all.

Exam. Sullivan: Any redirect, Mr. Gardner?

Mr. Gardner: None at all.

By Exam. Sullivan:

Q. Mr. Rawson, in your exhibits 42, 43 and 44 I presume that it should be understood that the figures shown for The Pennsylvania include the New Haven and Lehigh Valley also along the same lines as other exhibits?

A. Yes, that is so stated parenthetically at the head of the exhibits.

Q. I do not know whether this matter has been covered or not, but will you please turn to Article 4-B of the Agreement on page 18 of the Petition which provides for the payment of 1/12th of the annual interest at the rate of 5¾ per [fol. 98k-558] cent per annum on the cost of additions, extensions, improvements and betterments and so forth made after July 1, 1928, to said railroad, station, yards and other facilities and appurtenances. As I understand it, the station is out of this proceeding and if that is so, why is provision made for the payment of interest on the additions and betterments to the station?

A. It was felt that the additions and betterments to the station would largely be for the benefit of The Long Island Railroad and that the $15,000,000 omission from the investment would be a fixed amount and that The Long Island would pay on a wheelage basis for any further addition and betterments to the station building for whatever purposes made.

Q. But under this provision here they would pay that interest regardless of the part or portion of the station to which the additions and betterments might be applied?

A. Yes, that is true.

Exam. Sullivan: Are there any further questions of this witness?

Mr. Victory: Yes.

By Mr. Victory:

Q. Is it true that an incoming commuter does not know on which track he will arrive, that is, there is no train specifically assigned to any definite track?

A. Usually, in the normal schedule, the trains arrive and depart on certain tracks each day. That may be changed [fol. 98k-559] any time at the convenience of the railroad, but there is a regular assignment made, certain trains come in on certain tracks regularly in the normal schedule. If the schedule is thrown off or there is some blockade or something then they will be switched to other tracks.

Q. You are speaking now of your own knowledge?

A. Yes.

Q. Is it a fact that the amount of concessions has increased since 1928?

A. I do not think that has increased substantially at all since 1928. I think it is about the same in 1928 as in 1930, that is, slightly over a million dollars.

Q. You are again speaking of knowledge?

A. According to my recollection. I remember seeing the figures and that is my recollection of the figures; exactly what they will show, I do not know.

Q. Do you know if any costs for rearranging the station to allow more concessions has been charged to repairs and therefore appear in operating expenses?

A. I do not know.

Q. By addition of facilities for concessions, have operating expenses been increased?

A. Very little, if at all.

Q. Do you know?

A. I really have not inquired into that feature of it, but I [fol. 98k-560] know we do furnish heat in those stores which would be charged to the operating expenses. The light they pay for and there might be certain repairs that would have to be made to the stores.

Q. You have no idea of what the cost for making the repairs in the exit concourse was for last year?

A. No, they are not subdivided.

Q. There has been a tremendous change to permit the construction of concessions?

A. They have built stores along each side of the main exit concourse in the last three or four years.

Q. And principally during the past year?

A. I think it is more than a year ago that those were opened. Time flies so fast it is hard to keep track.

Q. As the rental increases due to larger percentage of use of the wheelage basis by The Long Island Railroad, do the services given to the commuter become more valuable or less through greater congestion?

A. That is rather hard to say.

Q. Have you any difficulty in answering that?

A. The mere fact that more commuters come there might indicate that the service is more valuable that attracts them.

Q. But you are nearing the point so to speak, of saturation?

A. Yes, I think we are.

Q. Have you already passed it?

[fol. 98k-561] A. Oh, no. We can stand a good many more people in our cars.

Q. Of course, that would necessitate standing on the platforms and jamming into the cars and like sardines in a box?

A. Yes.

Q. Has the character of commutation so changed since let us say, 1926, that there are fewer seasonal peaks in traffic?

A. Yes. The commutation is tending to become more uniform over the year, that is, the commutation in the winter time is increasing at a more rapid rate than in the summer time.

Q. And the summer traffic is also increasing from year to year?

A. Yes, it is still increasing, but the winter is increasing at a more rapid rate so that it is becoming more uniform as time goes on.

Q. Have these conditions been taken into account in these calculations that you have made, that is to say, in your application here for increased rental and so on, have you considered these facts?

A. No.

Mr. Victory: That is all.

COLLOQUY

Mr. Walternath: I judge from what I have heard up to now that the main contention is as to whether the increase in the rental will affect the increase in commutation rates, and I was just wondering if it is not possible in the final analysis of this question to determine as to whether the railroad will do that, will be permitted to do it and really want to do it.

[fol. 98k-562] Exam. Sullivan: That question I think was discussed while you were not here this morning. The witness has stated that so far as he knows there is no intention on the part of the applicants for making any change whatever.

Mr. Walternath: But there is no way of preventing the railroads from putting that into effect if they wish to.

Exam. Sullivan: They could apply for it in any event or file their tariffs with the local Commission whether this application were approved or not. They have that right at all times, I take it, to try to increase their fares and whether they are permitted to do it is something else. That is the subject of another proceeding and I presume a proceeding in which we are not interested here.

Mr. Walternath: There are other matters coming up which may alter this whole thing and there will have to be, in view of the conditions on the island.

Exam. Sullivan: But so far as this proceeding shows now there is no intention on the part of the applicant to make any changes in their fares for charges.

Mr. Walternath: There is no intent on my part to insinuate that there is.

Exam. Sullivan: There is no guarantee of any kind involved in that statement.

Mr. Walternath: Then in other words we will have to look after ourselves.

[fol. 98k-563] Exam. Sullivan: You will have to allow the future to take care of itself.

Mr. Victory: I will ask you to have put into the record the reports of The Long Island Railroad and of The Pennsylvania to the stockholders for the years 1929 and 1930,

if it has been published. The 1928 report was admitted in the last hearing and so I would suggest that that be done.

Exam. Sullivan: Is there any objection, Mr. Gardner, to the consideration by all parties of the Annual Reports to the stockholders ——

Mr. Gardner: I have already said to Mr. Victory that I would send him copies. He asked me at recess.

Exam. Sullivan: I presume they should be furnished for the record then as another exhibit and copies sent to all parties of record. It will be so understood that the reports of The Long Island and The Pennsylvania to stockholders for 1929 and 1930 will be submitted for the record and with copies to all parties of record.

The Witness: The 1930 may not be available in time.

Exam. Sullivan: If it is not, just so state in transmitting the 1929 report.

Mr. Hotchner: May we inquire what normally would be the expectation of availability of the 1930 report, when normally, Mr. Rawson, will expect that to be available?

The Witness: The reports are usually issued sometime [fol. 98k-564] in April. The Pennsylvania annual meetings are in April and The Long Island also. They are usually printed after those meetings.

Exam. Sullivan: It will stand in that way. Are there any further questions of this witness? The witness is excused.

(Witness excused.)

Exam. Sullivan: Have you any further witness, Mr. Gardner?

Mr. Gardner: No.

Exam. Sullivan: The applicants rest?

Mr. Gardner: Yes.

Exam. Sullivan: Mr. Stover, are you ready to proceed?

Mr. Stover: At the hearing yesterday, Mr. Examiner, I objected to exhibits 43, 44 and 45 on the ground that they were based on hearsay testimony and were therefore incompetent because we had no opportunity to cross-examine as to the source from which the information was derived and I said at that time I would not press the matter then, but I should now like to move to have those exhibits stricken from the record on the grounds that I have stated.

Mr. Hotchner: We join in that request.

Mr. Victory: The City of New York also joins in that request.

Exam. Sullivan: As I recall the testimony of the witness [fol. 98k-565] in submitting these exhibits it was to the effect that he had these figures compiled or compiled under his supervision or direction or had compiled them himself as a result of investigation made by him or made under his supervision. Is that correct?

Mr. Gardner: That is correct.

Mr. Stover: My understanding of the testimony slightly varies from that. His testimony was that the totals in those exhibits were taken from the records themselves, but that the distribution between The Pennsylvania and The Long Island was an allocation and that that allocation was made as follows:

He interviewed the supervisory heads of the various departments represented in these payroll figures and that it was their estimate that there should be allocated on the basis shown in the exhibits themselves.

If I recall it correctly, Mr. Rawson said it was not his estimate but their estimate and at that time I called attention to the fact that therefore these exhibits were based on the information of someone who was not here before us and whom we could not examine with the exception of the ticket agent's payroll.

Exam. Sullivan: Those figures were secured and the apportionments made following investigation by the witness and set out by him as the result of that investigation. Under the circumstances I will deny the motion to strike.

[fol. 98k-566] Mr. Stover: May I point out that the investigation consisted merely in asking these supervisory heads what in their opinion the ratio of distribution should be?

Exam. Sullivan: I appreciate that but the question in my mind is whether there is any method of securing any better information than securing it from the supervisory heads who know or should know what their men are doing.

Mr. Stover: I wish to have the Commission clear on this point, that I am not raising this purely as a technical point but solely because the method of proving it cuts us off from the right of effective cross-examination as to the facts on which this allegation was based. That is my sole reason for pressing that objection.

Exam. Sullivan: The ruling will stand. If you desire to note an exception ——

Mr. Stover: Yes.

Exam. Sullivan: An exception will be noted.

Mr. Stover: This is a continuation of the hearing that was held in 1929 and I shall not, of course, refer again to the question of jurisdiction that I then raised but shall rely upon the grounds then urged and present it in oral argument and briefs before the Commission.

Exam. Sullivan: Very well.

Mr. Stover: Now I want to call Dr. John Bauer as a witness for the Transit Commission.

[fol. 98k-567] John Bauer, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Stover:

Q. Dr. Bauer, did you testify at the prior hearing in this case?

A. I did.

Mr. Stover: And for the convenience of the Commission and the parties I will state that Dr. Bauer's prior testimony appears on pages 217 to 267 direct and on pages 267 to 277 in cross-examination. I understand, of course, that it would not be necessary to repeat any of the testimony that was given on that occasion.

Exam. Sullivan: No. That is all in the record now and is available to the parties in this proceeding.

By Mr. Stover:

Q. You stated your experience and qualification at the prior hearing up to the time that you testified?

A. Yes, sir.

Q. Do you wish to make any statement covering any experience you may have had since that hearing?

A. Well, not particularly. I have continued to be active since then and it is only two years ago. I have appeared since my last testimony in other public utility cases before Commissions.

I have since then completed a report for the New York [fol. 98k-568] State Legislative Commission that was appointed and sat during 1929 investigating the work of the Public Service Commission law.

During the past year I was economic adviser to the St. Lawrence Power Development Commission and I was a member of a Board of two appointed by the Commission to investigate the marketing problems and the method of marketing that would be available, the more desirable method if and when the St. L-wrence project is developed by the State of New York. I have continued since then my editorial work, writing and lecturing at different times on public utility matters, rates and capitalization and costs.

Q. Did you set out in the prior hearings the factors which in your opinion rendered the wheelage basis improper as a measure of the rents due to the Pennsylvania from the Long Island in their joint use of the Pennsylvania terminal properties?

A. I did.

Q. And do you still entertain the same views that you presented then?

A. Yes, sir, I do.

Q. Have you studied the proposed agreement now submitted, how it differs from the present agreement and the agreement proposed in 1929 hearings before the Interstate Commerce Commission?

[fol. 98k-569] A. I have.

Q. In your opinion does the present agreement approved by the Transit Commission in 1925 serve to mitigate in any way the impropriety of the general wheelage basis for the apportionment of costs between The Pennsylvania and The Long Island?

A. Yes, I think the present agreement mitigates materially the general impropriety of the wheelage basis used in determining the costs between the two companies.

Q. What are those mitigating factors and will you state them briefly?

A. There are two mitigating factors that appear in the present agreement and which were placed there by insistence on the part of the Transit Commission.

The first mitigating factor relates to the station and all the station costs. The station investment is taken out of

the joint account. That eliminates interest and taxes on $15,000,000 of investment.

In addition to that all of the operating expenses connected with the station, operation and maintenance, are eliminated from the joint account so that the first elements include interest and taxes on station investment and all operating expenses connected with the station.

The second mitigating factor is the insistence upon a low interest rate. When the matter of the rental was up before the Transit Commission the second time in 1925, I think it [fol. 98k-570] was, the company had eliminated the station, but increased the proposed interest to 5 per cent. The Commission in approving finally the agreement insisted upon a reduction to 4 per cent which has continued.

This low interest rate taken in conjunction with the wheelage basis as applied to all of the rest of the cost elements serves as a very distinct mitigating factor in reducing very materially the impropriety or the extent of the impropriety of the wheelage basis.

You understand when I mean impropery I mean as a reasonable and proper basis of allocation of costs.

Q. At the hearing you had defined what you meant by impropriety.

A. I did, yes.

Q. With these mitigating or balancing elements provided for by the Transit Commission in its approval, do you think that the objections to the wheelage basis were so met as to make the wheelage basis a reasonably working formula for its purpose?

A. I think that these two balancing factors did mitigate the impropriety of the wheelage basis very decidedly. I did not think in 1925, and have never thought that the mitigation was sufficient to make the wheelage basis meet properly the conditions existing as between the two companies as of 1923; as the agreement was extended backward to 1923, the objection at that time was much less serious than it proved to be in the passing of time with the in- [fol. 98k-571] creasing wheelage ratio on the part of The Long Island.

Q. Do you think that the wheelage basis can be mitigated or balanced as to make it a satisfactory method of cost allocation for the Pennsylvania station?

A. In a broad sense I think so if I may be allowed to explain as briefly as possible what I have in mind.

Q. I wish you would.

A. There are very few expense elements or any kind of expense cost elements in connection with the station use and operation that are dependent at all directly upon the number of wheelage units operated through the station.

There is, in other words, increasing economy as to unit costs with respect to practically every expense of cost elements incurred in connection with the station, its existence, operation and maintenance, the application of the wheelage ratio does not involve nearly so much impropriety as applied generally to operating expenses or even to maintenance except maintenance of the station building itself.

The impropriety comes in principally as the wheelage ratio is applied to the interest and factors covering the very heavy investments in the elaborate and costly structures which are placed there and were placed there primarily because of requirements and needs and advantages of The Pennsylvania rather than the needs of The Long [fol. 98k-572] Island for its type of operation.

I think that the wheelage ratio is a convenient measure of costs if it is properly limited in its scope of operation and if proper mitigating factors or elements are brought in it is convenient, as I think Commissioner Harkness pointed out, that it does provide certain flexibility in its application as one carrier really needs more space and more attention, but it has to be mitigated with regard to those very heavy fixed charges, interest and taxes.

With that explanation I will say it can be made, I think, a workable instrument or a workable method, practicable method with reasonable justice to both companies, if enough mitigating elements are put in along the line that the Transit Commission required in its approval in 1925.

Q. How does the proposed agreement affect the balance which was established by the Transit Commission in 1925 and approved in the existing agreement. Will you take up the situation as to the station cost factors first?

A. With regard to the station cost factor the company followed the requirement of the Transit Commission by eliminating $15,000,000 of investment and thus eliminating from the joint account the interest on that investment, and the taxes on the building, but it throws back upon The

Long Island 20 per cent of the operating expenses of the station. The principal objection to the wheelage ratio applied to operating expenses appears especially in the ex- [fol. 98k-573] penses connected with the station.

The expenses are large as they are due principally, dominantly to the Pennsylvania. That offsetting factor will be removed. The 20 per cent results in putting upon The Long Island over $400,000 a year or near $400,000 a year for station expenses and that is a large amount, and to that extent upsets the balance that was put in against the impropriety of the wheelage basis by the Transit Commission.

I might add that apart from the fact that a distinct balance is destroyed by putting the 20 per cent station costs upon The Long Island, there is also the separate objection to the 20 per cent basis in that the expenses are due primarily to The Pennsylvania. Hence, they are likely to go up and down more with The Pennsylvania use for prosperity so that the charges to The Long Island on the 20 per cent basis would be dependent not primarily upon what The Long Island actually requires but upon what the financial circumstances and uses of The Pennsylvania will have to meet.

That is indicated very clearly by exhibits 41 and 42 and the figures that can be derived from them.

I will not attempt to go into that analysis. I have made the point and the analysis can be supported by the figures from the two exhibits.

Q. Have you made an analysis of the rentals under the [fol. 98k-574] present agreement to show what increases have taken place since that agreement went into effect?

A. Yes, I have.

Q. Can you present the results now?

A. Yes, I had intended to get this tabulated but I did not get around to do it.

Mr. Gardner: Can you not read it into the record?

Exam. Sullivan: That is just what he will do now.

Mr. Gardner: I thought Mr. Stover looked inquiringly at me.

Mr. Stover: I did.

Mr. Gardner: Then you have my approval.

The Witness: I shall do that. I shall have the figures typed and sent to counsel. I have taken each of the rental

elements as set out in exhibit No. 6 up to and including the year 1928, and for 1929 and 1930 as set out in exhibit 41. I have taken the year 1924 and 1930. 1924 I have taken from exhibit No. 6 and 1930 from exhibit 41. I have started with the year 1924 because that was the first complete year on the basis of the new agreement. 1923 was not completely on the present agreement and hence the figures would not be fully comparable.

Taking there for 1924 as against 1930, a period of six years, the operating expenses, that is, the joint facility operating expenses, including maintenance and operation, [fol. 98k-575] but excluding station expenses from the joint account, the allocation to The Long Island has increased by $125,989.

Second, the interest element, most of it at 4 per cent, that has increased over the same period by $186,712.

The tax element has increased $54,735. The power charges $195,207. The direct charges $35,386.

There has thus been an aggregate increase for the five individual elements, amounting to $598,029. This has been practically an increase of $100,000 a year. This increase has been due very largely to the almost constant shift of the wheelage ratio*n*.

During this period The Long Island wheelage ratio has increased from 37.08 per cent in the station zone, and this is shown by Exhibit No. 8, to 42.08 per cent in 1930. Every year during the six year period showed an increase except 1929 and that showed a decrease due to the sharp increase in Pennsylvania operation but there was also a Long Island operation increase during that year.

In the tunnel zone from Sixth Avenue to Harold Avenue there was an increase in the Long Island wheelage ratio from 56.19 to 60.49 per cent. The practically $600,000 increase or $100,000 increase a year, as an average, is due principally to a very large extent to the steady increase in the Long Island wheelage ratio and not directly to greater expenses and costs due to the larger or steadily expanding [fol. 98k-576] Long Island operation.

Q. What relation has the increase in rentals to the wheelage basis?

A. This is just what I have tried to show, that each year as The Long Island aggregate wheelage has moved up and

up as compared with The Pennsylvania, the wheelage ratio has steadily increased, but the result has been that this increase, whatever the effect may have been upon the actual costs imposed upon the system, that a larger percentage year by year of those joint expenses and especially of the heavy interest and taxes upon the elaborate terminal properties, have been conveyed over to The Long Island even though no direct additional costs were caused at all by The Long Island operation.

Q. Have you made comparison of the wheelage ratios for the entire period since that basis has been used for the determination of rental payments by The Long Island?

A. Yes, I have.

Q. And can you present the results, taking up separately the different zones?

A. Yes. The comparison is based from 1911 to 1928 on exhibit No. 8 and for 1929 and 1930 it is based upon exhibit 41.

Mr. Gardner: Are those exhibits in the Interstate Commerce Commission case or in the Transit Commission case?

The Witness: These are exhibits numbered in the Interstate Commerce Commission case.

[fol. 98k-577] Mr. Gardner: I merely asked for the clarity of the record.

The Witness: Yes. It happens that the available figures for the wheelage ratio as shown by the two exhibits that I have mentioned divide themselves into two ten-year periods. The first ten-year period is 1911 to 1920, inclusive. The second is 1921 to 1930, inclusive.

The wheelage ratio advanced in the station zone—I am now taking up the station zone—the wheelage ratio advanced during the first ten years from 21.9 per cent on the part of The Long Island to 28.55 per cent in 1920.

Then the second ten-year period, the ratio advanced from 30.96 per cent for The Long Island in the station zone to 42.08 per cent in 1930. The rate of increase in this ratio has been more rapid during the second ten-year period than during the first ten-year period while the station zone has been used largely by the two companies.

Taking now the tunnel zone, the Long Island ratio changed during the first ten years from 38.27 per cent in 1911 to

46.53 per cent in 1920. Then during the second ten-year period the Long Island ratio increased from 49.50 per cent to 60.49 per cent.

Again the rate annually increased in the Long Island wheelage ratio and was faster and greater during the second ten-year period than during the first ten-year period.

The result of course, has been that with respect to all of [fol. 98k-578] the elements to which the wheelage ratio was applied, there has been a steady increase in the amount of the charges placed upon The Long Island without regard to the actual additional costs that the expanding Long Island operation may have caused.

In other words, the cause of these mounting ratios, the charges to The Long Island would have increased rapidly from year to year even if the expanding operations had produced no actual additional costs.

Q. For the future is there likely to be continuous increase in the wheelage ratios of The Long Island?

A. In my opinion, yes. This opinion is based first upon the fact that as I have shown there has been no let-up in the rate of annual increase in the wheelage ratio of The Long Island. There has been an acceleration instead of a decrease.

In the second place there is now a change in the operation to extend the length of the trains to twelve cars instead of ten cars as was largely the practice in the past, and that is during rush hours and this increase in train length, while it reduced traffic congestion, will increase very materially the wheelage ratio of The Long Island and as Long Island traffic increases in my judgment there will be finally a lengthening, there must be finally a lengthening to still longer trains, 15 car trains and there will have to be an increase in the number of trains operated, and as that [fol. 98k-579] takes place The Long Island wheelage ratio will increase and will have the effect of transferring proportionately all the heavy fixed charges on the expensive and elaborate facilities upon the Long Island even though the increase in this operation merely means a greater congestion of The Long Island facilities during the few hours of the day, without any substantial additional costs upon the terminal properties.

And so I see nothing in sight that would indicate a material let-up in this ever-mounting wheelage ratio of The Long Island, at least not for quite a while.

Q. Then what effect will this future increase have upon the rental paid by The Long Island even under the present agreement?

A. The effect of it will be to transfer proportionately all of the heavy fixed charges, taxes and interest, and many of the operating expenses, upon The Long Island relieve the Pennsylvania to that extent.

The general effect of that is on the basis of the present agreement, and on the basis of the present range of costs that every point increase of the Long Island wheelage ratio results in about $75,000 or a figure near that amount of higher rental placed upon The Long Island under the present agreement.

Q. The present agreement was allowed to become effective in 1923?

[fol. 98k-580] A. That is correct.

Q. Have you got the figure for the rental for that year under the present agreement?

A. The present agreement if my memory is correct, and I did not check this up, but I think the present agreement went into effect in the middle of the year.

Q. Yes, it did in July, 1923.

A. Exhibit No. 6 gives the different rental elements for 1923, but half of the year is based upon the prior agreement and half of it is based on the present agreement as approved by the Transit Commission in 1925. So that the first year that I have the figures that represent the agreement fully is 1924.

Q. What were the total figures for that year?

A. The total rental for 1924 was $2,320,168.

Q. And have you the figures for 1930?

A. Yes, the total rental for 1930 including all five elements——

Q. Did the other figures that you gave include all five elements?

A. Yes—is $2,918,197. This figure is taken from Exhibit No. 41 and the difference between the two totals gives the increase that I have stated for the period $598,029, or an average of just practically $100,000 a year.

Q. Have you any other comment you would like to make [fol. 98k-581] any phase of this case?

A. No, I think I have about exhausted my ideas on it.

Mr. Stover: That is all.
Mr. Gardner: No questions from me.

By Mr. Walternath:

Q. The witness mentioned the fact that as the wheelage of The Long Island increases their indebtedness to The Pennsylvania Railroad would increase, is that right?

A. Yes.

Q. If they run more cars they are forced to pay The Pennsylvania a proportionate increase in their rental?

A. Yes, as compared—it is all on a ratio. It depends on the number of Long Island cars as compared with Pennsylvania cars. What I am trying to get clear is that if The Pennsylvania cars increase in the same proportion as The Long Island cars, then The Long Island would not get any larger charge, but if The Long Island number increases in a faster proportion than The Pennsylvania, then the Long Island will get correspondingly a higher percentage of the charges.

Q. My point was this. If The Long Island runs longer trains it must be that their traffic is increasing?

A. Not necessarily, but normally. Take for example, to make clear, for 1930, The Long Island had a very sharp increase in the number of car units. On the other hand it had but a slight increase in the number of passengers. The [fol. 98k-582] reason for that situation is that a number of the twelve-car trains were put into operation during 1930 and that relieved the congestion during rush hours. But except for that you are correct.

Q. But my assumption is, living on Long Island, that it will increase a great deal in the next five or ten years.

A. I think so. I think there will be a steady increase in number of passengers on Long Island. There is not any doubt about that.

Q. I was wondering whether that increase in traffic would be a good reason why The Long Island would not be able to pay a higher rental without increasing the cost to the commuters. If they are earning more money they can afford to pay more rent and if they are not they have to take it out of us?

A. You realize that goes into another phase of the case. With the growing traffic on The Long Island, and if the present rental agreement were continued in force, and if

otherwise the level of operating costs were not to increase, I think you are right.

By Mr. Victory:

Q. So that the only opportunity the company would have for the ground for an application for an increase in commutation rates would be an increase in operating expenses?

A. That of course, I do not know. There are other elements that enter into it. But an increase in rental pay-
[fol. 98k-583] ments of over $1,000,000 a year, through the two changes that are put into the proposed agreement, there would be undoubtedly a so much more favorable showing for a higher commutation rate, of course.

By Mr. Stover:

Q. As the wheelage ratio of The Long Island increases, the rental paid by The Long Island increases?

A. Yes, sir.

Q. That rental is made up of elements of operating expenses, taxes and interest?

A. Yes, sir.

Q. So that when the wheelage ratio increases The Long Island has to pay not only more of the operating expenses but also more of the taxes and the interest?

A. Yes, sir, and it is on this latter element where I think the impropriety of the wheelage basis appears more particularly.

Q. You do not see any relation between the increase in the business and the payments which should be made in respect of taxes and interest?

A. None whatever.

Q. Although you do recognize it in the case of operating expenses?

A. I said none whatever, but I mean none whatever so far as the past investment and the layout generally of the station is concerned. It is quite conceivable and quite prob-
[fol. 98k-584] able that as The Long Island operation continues to increase there may be very distinct station alterations which will be due to The Long Island traffic, and in that way the increase in Long Island business operation would cause directly higher expenses, but with that exception I agree with you.

Exam. Sullivan: Any further questions?

By Mr. Hotchner:

Q. In your statement, Doctor, of activities had by you along this type of work since the hearings a year and a half or so ago, I do not think you mentioned the fact that you are at present engaged on behalf of the communities in Westchester in the New York Central Railroad fare case, is that a fact?

A. Yes.

Q. Is there involved in that a study of the conditions at the Grand Central station in New York City?

A. Yes, sir.

Mr. Hotchner: That is all.

Exam. Sullivan: The witness is excused.

(Witness excused.)

Exam. Sullivan: Any further witnesses, Mr. Stover?

Mr. Stover: No further witnesses.

Exam. Sullivan: Any witnesses, Mr. Victory?

Mr. Victory: No.

Exam. Sullivan: I presume counsel desires to brief this case. Mr. Rawson, about how soon do you think that the [fol. 98k-585] data to be furnished by you will be in?

Mr. Rawson: I hope within two weeks, but I would like to set a three weeks limit.

Exam. Sullivan: That will take it up pretty close to the middle of April. Under the circumstances I presume counsel will want 30 days from the receipt of that data for their briefs?

Mr. Stover: I should like it.

Exam. Sullivan: We will assign May 15th as the date for all briefs in this case. All briefs to be filed concurrently and no reply briefs. This of course, will be a proposed report case again.

Is there anything further? The hearing is closed.

(Whereupon, at 3:20 p. m. March 24, 1931, the hearing in the above-entitled matter was closed.)

[fol. 981-1] Exceptions must be filed with Commissioner and copies served so as to reach opposing counsel on or before Jul. 20, 1931.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

LONG ISLAND R. CO. TRACKAGE

Submitted —— —, ——. Decided —— —, ——

Upon further hearing, recommended that the joint application of the Pennsylvania Railroad Company and the Long Island Railroad Company for authority permitting the latter to operate under trackage rights over the line of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue in Sunnyside Yard, and the Pennsylvania Station, New York, N. Y., including the partial use of said yard, station, and appurtenant facilities, under the terms of a proposed agreement dated December 23, 1930, be denied without prejudice. Previous report 162 I. C. C. 218.

Alfred A. Gardner, D. P. Williams, and Joseph F. Keany for applicants.

Arthur J. W. Hilly, Vincent Victory, M. Maldwin Fertig, and Harry Hertzoff for City of New York; George H. Stover and Edward M. Deegan for Transit Commission of the State of New York; Maurice Hotchner for Association of Long Island Commuters; Howard C. Wilson for Village of Lynbrook, N. Y., and for Nassau County Village Officials' Association; W. F. Walternath for Nassau County Civic Federation, interveners.

SUPPLEMENTAL REPORT PROPOSED BY M. S. JAMESON, EXAMINER

The original application in this proceeding was for a certificate under section 1 (18) of the interstate commerce act authorizing The Long Island Railroad Company to operate under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company, The Pennsylvania Railroad Company lessee, between Sunnyside Yard and the passenger terminal in New York City, a distance of 4.2 miles. This operation had been going on since the completion of the terminal and its approaches in Sep-

tember, 1910, but the applicants desired to make important changes in the terms and conditions of the joint operating agreement in effect since 1923. The application also contained a request for an order under section 3(4) of the act, requiring the use of the facilities by the Long Island [fol. 981-2] on the terms and for the compensation stated. A hearing was held, briefs were filed, and an examiner's proposed report was issued. After oral argument had been had, the commission, on March 18, 1930, entered an order dismissing that part of the application which was for an order under section 3(4), and denying that part which was under section 1(18). A finding was announced, however, that the public convenience and necessity required the continued operation by the Long Island, under trackage rights, over the railroad of the Terminal Company as described in the application, but that the terms of the proposed agreement submitted with the application were not just and reasonable. Long Island R. Co. Trackage, 162 I. C. C. 218. Over the objections of the interveners, the commission asserted that its jurisdiction under section 1(18) extended to the terms and conditions governing the Long Island's trackage operation.

The existing agreement executed by the Long Island and the Pennsylvania is dated July 28, 1925. It was approved by the Transit Commission after extended hearings and investigation and was made retroactive to July 1, 1923. The tentative agreement accompanying the original application filed with this commission was dated November 13, 1928. On December 27, 1930, the applicants renewed their request for a certificate under section 1(18), presenting with their petition a new set of terms in the form of a modified agreement dated December 23, 1930. A further hearing was held and briefs were filed. The interveners' objection to the granting of the application extends to this modified contract. The issue now before the commission is simply whether the terms and conditions of the modified agreement should or should not be found just and reasonable.

The Pennsylvania's facilities which are used by the Long Island and are involved in the case may be described briefly [fol. 981-3] as follows, the investments or valuations being as of July 1, 1928:

Zone 1

Bounded by Sixth Avenue, Thirty-first Street, Tenth Avenue, and Thirty-third Street, Manhattan, and including

(a) The Pennsylvania Terminal building above track level, and one-half the service plant; investment	$15,000,000.00
(b) The yard and tracks; investment	31,896,746.94
	$46,896,746.94

Zone 2

Tunnels east of zone 1 and under the East River, and tracks connecting at Harold Avenue, Borough of Queens, with the Long Island's lines. Investment	$32,605,521.38

Zone 3

Sunnyside Yard and adjacent facilities near Harold Avenue. Investment	$8,623,170.90

Power

Electric power plant in Long Island City, and the distribution system. Investment	$10,356,032.03

The values stated are not objected to per se by the interveners.

It is unnecessary to repeat here the details of former reports which describe the various changes and proposed changes in the terms of operating contracts applying to the Long Island's use of these facilities for extending its passenger service into the city of New York. Under the existing arrangement, the station building above track level and its appurtenant service plant are entirely excluded from the facilities for which rental is paid. All the other facili- [fol. 981-4] ties are included, the Long Island's rental being calculated on the basis of the proportional number of car movements in each zone monthly. This proportion or ratio is applied to the total cost of operation, to taxes, and to interest on the investment. The rate of interest is 4 per cent per annum, except on the power plant and electric distribution system, which carry 4.5 per cent.

The proposed agreement of November 13, 1928, which the commission disapproved as not being just and reasonable, would have increased the Long Island's annual rental by approximately $1,600,000. Under that plan the rate of interest was to be 6 per cent, the station was to be included, and the wheelage basis of apportionment was to be continued as the method of determining the Long Island's payment for interest on the investment, operating expenses, and taxes on all the joint property in all the zones. The commission said in its report that this contract would impose unreasonable terms upon the Long Island in respect of the inclusion of the entire station in the investment of zone 1, the inclusion of all operating expenses, maintenance, and taxes connected with the station, the indiscriminate use of the wheelage ratio both to basic values and to expenses, and the employment of 6 per cent as the annual rate of interest on the value of the facilities.

In an effort to meet the commission's objections, the applicants prepared and submitted the modified agreement of December 23, 1930. The station building and its service plant are therein omitted from the facilities for which the Long Island is to pay rental in so far as interest on investment and taxes are concerned. The operating cost of these facilities, however, would be shared, the Long Island paying one-fifth of such cost monthly. To support the fairness of this proportion, the applicants introduced state- [fol. 981-5] ments showing a distribution of the time of station employees of all classes. No credit to the Long Island is proposed to be allowed for privileges, rents, and concessions in the station, on the theory that such an allowance would be unwarranted when the Long Island is not required to bear any part of the interest and taxes on the building. In 1930, the gross revenues to the Pennsylvania from concessions in the station and zone 1 exceeded $1,000,000, of which approximately one-third was from concessions in the Long Island concourse. With respect to the track level facilities in all zones, and the power and distribution system, the latest agreement provides that the Long Island shall pay a wheelage proportion of the interest at 5.75 per cent per annum on the investments as of July 1, 1928, together with the same proportion of operating expenses, maintenance, and taxes.

The wheelage ratio is also proposed to be applied to the annual interest at 5.75 per cent on all additions and betterments, including those in the station building itself, made subsequent to July 1, 1928. As regards the propriety of this particular provision, when the Long Island is not to pay any part of the taxes or interest on the original station investment, the applicants explain that any station improvements made subsequent to July 1, 1928, would probably be in large part for the benefit of the Long Island. The assumption seems questionable, and this article of the contract should be revised accordingly.

As in the rejected agreement of November 13, 1928, the terms of the new contract is 20 years, with provision for continuation from year to year thereafter unless terminated by at least six months' notice by either party. The effective date is January 1, 1931. At the ends of 5-year periods, and upon 60 days' written notice, either party may [fol. 981-6] seek a modification in the rate of interest for rentals or in the bases upon which such interest are computed, and in the event the parties are unable to agree in respect of any such proposed modifications the question shall be submitted to arbitrators in the manner provided for in a later article of the contract. This clause was mentioned but not criticised in former reports. It would leave the applicants, which are closely affiliated, a large measure of freedom in changing important terms of the contract after the expiration of five years, and it should manifestly be altered to the extent that such changes in the interest rate, etc., shall be made subject to the approval of this commission. Otherwise, the commission's sanction of the contract containing the above quoted clause as it stands would carry with it authority for the parties to modify some of the basic terms without submitting the new terms for approval.

The effect of introducing the terms of the agreement of December 23, 1930, may be seen from the following comparison:

Total Payments by Long Island

1928:	Present basis	Proposed basis
Interest, zones 1, 2, and 3	$1,361,842	$1,941,318
Taxes, zones 1, 2, and 3	550,398	550,398
Operation, zones 1, 2, and 3	459,902	902,105
Power	324,416	334,686
Direct charges	138,623	138,623
Totals	2,835,181	3,867,130

1929:	Present basis	Proposed basis
Interest, zones 1, 2, and 3	1,332,940	1,905,899
Taxes, zones 1, 2, and 3	547,276	547,276
Operation, zones 1, 2, and 3	448,906	934,220
Power	331,253	341,006
Direct charges	131,591	131,591
Totals	2,791,966	3,859,992
1930:		
Interest, zones 1, 2, and 3	1,386,153	1,979,425
Taxes, zones 1, 2, and 3	571,184	571,184
Operation, zones 1, 2, and 3	476,873	885,392
Power	362,562	372,799
Direct charges	121,425	121,425
Totals	2,918,197	3,930,225

[fol. 98l-7] The wheelage ratios, representing the proportion of Long Island cars handled in each of the three zones in 1930, were: Zone 1, 42.08 per cent; zone 2, 60.49 per cent; zone 3, 7.65 per cent.

It is noted that the major part of the increase of more than $1,000,000 in the Long Island's annual rental under the new proposal is brought about by the change in interest rate from 4 and 4.5 per cent to a uniform rate of 5.75 per cent, and by the charging of 20 per cent of the operating expenses of the station to the Long Island. In connection with the first of these proposed changes, the applicants cite the commission's finding that 5.75 per cent will constitute a fair return upon the aggregate value of railway property in all rate group or territories. Reduced Rates, 1922, 68 I. C. C. 676. With respect to this argument, it may be suggested that the general ruling cited does not necessarily apply to individual terminal properties or to contractual relations between carriers without regard to special circumstances. Under the lease of the Terminal Company's property to the Pennsylvania, authorized by the commission in Acquisition by P. R. R., 145 I. C. C. 283, the Pennsylvania pays 5 per cent on $50,000,000 par value of capital stock of the Terminal Company, and 4.5 per cent on $58,600,577 principal amount of its bonds. As was stated in the commission's report in the instant case, the average cost of money during the period when the terminal was constructed was about 5 per cent. Various rates of interest on investment are incorporated in trackage contracts which have come before the commission for approval, but the circumstances differ in most cases and no universal, fixed rate is practicable or desirable. In the situation here, the

facts tend to show that a uniform rate of 5 per cent would be just and reasonable to both parties.

[fol. 981-8] Objection is raised to the introduction of the station operating and maintenance expenses into the Long Island's rental as now proposed, on the grounds that such small part of these expenses with which the Long Island would be properly chargeable, considering its relatively slight use of this extensive and elaborate station, is more than outweighed by adopting the wheelage method in fixing the rental of the facilities which are at track level, i. e., facilities other than the station building above track level. Objection is also raised to the inclusion of all the land in zone 1 in the investment upon which the Long Island pays interest.

In the existing agreement, the Transit Commission approved the use of the wheelage method for these other facilities only because the alleged injustice of that method to the Long Island was considered to be mitigated by omitting all interest, taxes, and operating charges in connection with the station building, and further, by computing interest at 4 per cent on the investment in such other facilities within the three zones. As explaining their objection to the wheelage ratio, the interveners point to the steadily increasing traffic of the Long Island up to the present time, while the Pennsylvania's passenger business remained the same or decreased, and to the constant increase in the Long Island's rental based on the rising wheelage ratio, without regard to the additional actual costs which that carrier's increased traffic may have caused. The Transit Commission points out that the elimination of station operation, interest, and taxes, for which elimination it was responsible in 1925, represented $741,762 in annual charges to the joint account. Outside the station building, the low rate of interest accounts for further elimination of charges to which the wheelage ratio would apply. These mitigating [fol. 981-9] factors were considered to offset the objections to using the wheelage method of apportionment, particularly when the taxes and the operating expenses represented facilities more extensive than the Long Island would require for its service. The wheelage method is held largely accountable for the increase of nearly $100,000 a year in the Long Island's rental payments since 1924, and

it is true that there has been a steady and substantial increase in the proportion of Long Island cars. There has also been an increase in the basic costs, but not to a corresponding degree.

It is contended that the mitigating factors reflected in the terms of the present agreement would be much impaired by the requirement that the Long Island shall pay 20 per cent of the operating expenses of the station, thereby adding more than $400,000 to the present annual rental charge. The applicant's distribution of the operating cost of the station was questioned, the above mentioned expenditure was stated to be more than the Long Island's operation could possibly entail, and attention was called to the contingency that the Long Island would be required to pay this fixed proportion of a total expense which would vary with the Pennsylvania's rather than the Long Island's activities.

It may be observed that 20 per cent is less than either the square-foot or cubic-foot proportion which the exit concourse in the station bears to the total building. In his first proposed report the examiner suggested that an equitable division of the terminal above track level would be approximated by assigning to the Long Island such part of the entire building as is represented by the exit concourse, and that this ratio should be used in determining the Long Island's proportion of such total station expenses [fol. 981-10] as could not be assigned directly to either carrier. On this basis, the proposed allocation is not disadvantageous to the Long Island. With respect to the car movements in zone 1, the proposed 20 per cent is less than one-half the proportion of Long Island car movements at the present time. With respect to the total number of passengers using the terminal, of which number about 82 per cent are Long Island passengers, the proposed ratio is extremely low. As has been explained in former reports, there is no exact method by which the use of the station building as a whole may be divided between the Long Island on the one hand and the Pennsylvania and its other tenant carriers on the other hand. The extensive testimony pertaining to this question only emphasizes the fact that no mathematical solution of the problem can be expected. But the adoption of a fairly approximate basis of apportion-

ment of operating expenses is nevertheless possible. From all the evidence and agreements presented, the proposed 20 per cent apportionment of station expenses can not be found unreasonable, and it may be properly retained as a provision of the contract.

For the facilities other than the station, the application of the wheelage ratio to total interest, taxes, and operating charges, in the manner prescribed both by the present and proposed contracts is evidently the most convenient and practicable measure of use that is available. Notably in the case of the tunnels in zone 2, a closer approach to a division of the facilities on a physical basis could be worked out. Cognizance should be taken of the different requirements of the Long Island and the Pennsylvania for terminal facilities in New York City; of the difference in traffic density and in unit costs of operation. The Transit Commission, as has been explained, considers that the [fol. 981-11] terms of the present agreement provide a balance between the results of using the wheelage ratio and those produced by leaving the station building entirely out of the rental and adopting a low rate of interest for the other facilities. With due regard to the contentions of the interveners, it does not appear, on the whole, that injustice would be done by adhering to the wheelage basis to the extent contemplated in the latest agreement.

In connection with rents and concessions, no reason is apparent for not crediting the joint account with the revenues received from the track level concessions as was proposed to be done in the original application. In 1930, these revenues amounted to $25,557 in zone 2, and $66,025 in zone 3. The theory upon which the station concessions were eliminated in connection with the station clearly does not apply to zones 2 and 3, for the reason that in those zones the Long Island would be obligated to pay a rental covering interest on cost and taxes.

It will be informative to show a comparison of the total rental paid and proposed to be paid by the Long Island. The following figures are based on operations in the year 1928 and reflect credits for concessions where applicable. Charges for power and direct charges to the Long Island are included.

Present contract dated July 28, 1925	$2,835,181
Rejected contract dated November 13, 1928, approximately	4,453,000
Proposed contract dated December 23, 1930	3,867,130
Proposed contract revised according to the recommendations in this report, approximately	3,588,000

In respect of the terms and conditions mentioned, and to the extent herein indicated, the proposed contract of December 23, 1930, is considered improper as an operating basis for the certificate sought. Upon the facts presented in the further hearing the commission should enter an [fol. 98l-12] order denying the application filed under section 1(18) as modified by the proposed operating agreement dated December 23, 1930, without prejudice to the submission of a further contract, the terms and conditions of which shall be just and reasonable. The finding of public convenience and necessity heretofore announced should not be disturbed.

[fol. 98m-1] INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

LONG ISLAND R. CO. TRACKAGE

Submitted October 20, 1931. Decided February 8, 1932

Upon further hearing, certificate issued authorizing the continued operation by the Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue, in Sunnyside yard, and the Pennsylvania Station, New York, N. Y., including the joint use of said yard, station, and appurtenant facilities. Conditions prescribed. Previous report 162 I. C. C. 218.

Alfred A. Gardner, D. P. Williams, and Joseph F. Keany for applicants.

Arthur J. W. Hilly, Vincent Victory, M. Maldwin Fertig, and Harry Hertzoff for city of New York; George H. Stover

and Edward M. Deegan for Transit Commission of the State of New York; Maurice Hotchner for Association of Long Island Commuters, Incorporated; Howard C. Wilson for village of Lynbrook, N. Y., and for Nassau County Village Officials' Association; W. F. Walternath for Nassau County Civic Federation, interveners.

Division 4, Commissioners Meyer, Aitchison, and Mahaffie

REPORT OF THE COMMISSION ON FURTHER HEARING

By DIVISION 4:

Exceptions were filed to the supplemental report proposed by the examiner, and further oral argument was had. Our conclusions differ from those of the examiner with respect to the issue of a certificate.

The original application in this proceeding was for a certificate under section 1(18) of the interstate commerce act authorizing The Long Island Railroad Company to operate, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company, The Pennsylvania Railroad Company, lessee, between Sunnyside yard and the passenger terminal in New York City, a distance of 4.2 miles. This operation had been going on since the completion of the terminal and its approaches in September, 1910, but the applicants desired to make important changes in the terms and conditions of the joint operating agreement which took effect in 1923, technically expired on December 31, 1925, and was extended for one year. The application also contained a request for an order under section 3(4) of the act, requiring the use of the facilities by the Long Island on the terms and for the compensation stated. An order was entered on March 18, 1930, dismissing that part of the application which was for an order under section 3(4), and denying that part which was under section 1(18). A finding was announced, however, that the public convenience and necessity required the continued operation by the Long Island, under trackage rights, over the railroad of the Terminal Company as described in the application, but that the terms of the proposed agreement [fol. 98m-2] submitted with the application were not just and reasonable. Long Island R. Co. Trackage, 162 I. C. C. 218. Over the objections of the interveners, we held that

our jurisdiction under section 1(18) extended to the terms and conditions governing the Long Island's trackage operation.

The existing agreement executed by the Long Island and the Pennsylvania is dated July 28, 1925. It was approved by the Transit Commission after extended hearings and investigation and was made retroactive to July 1, 1923. The tentative agreement accompanying the original application filed with us was dated November 13, 1928. On December 27, 1930, the applicants renewed their request for a certificate under section 1(18), presenting with their petition a new set of terms in the form of a modified agreement dated December 23, 1930.

The Pennsylvania's facilities which are used by the Long Island and are involved in the case may be described briefly as follows, the investments or valuations being as of July 1, 1928:

Zone 1

Bounded by Sixth Avenue, Thirty-first street, Tenth Avenue, and Thirty-third Street, Manhattan, and including	
(a) The Pennsylvania Terminal building above track level, and one-half the service plant; investment	$15,000,000.00
(b) The yard and tracks, investment	31,896,746.94
	$46,896,746.94

Zone 2

Tunnels east of zone 1 and under the East River, and tracks connecting at Harold Avenue, Borough of Queens, with the Long Island's lines. Investment	32,605,521.38

Zone 3

Sunnyside yard and adjacent facilities near Harold Avenue. Investment	8,623,170.90

Power

Electric power plant in Long Island City, and the distribution system. Investment	10,356,032.03

The values stated are not objected to per se by the interveners.

It is unnecessary to repeat here the details of former reports, which describe the various changes and proposed changes in the terms of operating contracts applying to the Long Island's use of these facilities for extending its passenger service into the city of New York. Under the arrangement now in effect the station building above track level and its appurtenant service plant are entirely excluded from the facilities for which rental is paid. All the other facilities are included, the Long Island's rental being calculated on the basis of the proportional number of car movements in each zone monthly. This proportion or ratio is applied to the total cost of operation, to taxes, and to interest on the investment. The rate of interest is 4 per cent per annum, except on the power plant and electric distribution system, which carry 4.5 per cent.

[fol. 98m-3] The proposed agreement of November 13, 1928, which we disapproved as not being just and reasonable, would have increased the Long Island's annual rental by approximately $1,600,000. Under that plan the rate of interest was to be 6 per cent, the station was to be included, and the wheelage basis of apportionment was to be continued as the method of determining the Long Island's payment for interest on the investment, operating expenses, and taxes on all the joint property in all the zones. We said in our prior report that this contract would impose unreasonable terms upon the Long Island in respect of the inclusion of the entire station in the investment of zone 1, the inclusion of all operating expenses, maintenance, and taxes connected with the station, the general application of the wheelage ratio both to basic values and to expenses, and the employment of 6 per cent as the annual rate of interest on the value of the facilities.

In an effort to meet our criticisms, the applicants prepared and submitted the modified agreement of December 23, 1930. The station building and its service plant are therein omitted from the facilities for which the Long Island is to pay rental in so far as interest on investment and taxes are concerned. The operating cost of these facilities, however, would be shared, the Long Island paying one-fifth of such cost monthly. To support the fairness of this proportion, the applicants introduced statements

showing a distribution of the time of station employees of all classes. No credit to the Long Island is proposed to be allowed for privileges, rents, and concessions in the station, on the theory that such an allowance would be unwarranted when the Long Island is not required to bear any part of the interest and taxes on the building. In 1930, the gross revenues to the Pennsylvania from concessions in the station and zone 1 exceeded $1,000,000, of which approximately one-third was from concessions in the Long Island concourse. With respect to the track level facilities in all zones, and the power and distribution system, the latest agreement provides that the Long Island shall pay a wheelage proportion of the interest at 5.75 per cent per annum on the investments as of July 1, 1928, together with the same proportion of operating expenses, maintenance, and taxes.

The wheelage ratio is also proposed to be applied to the annual interest at 5.75 per cent on all additions and betterments, including those in the station building itself, made subsequent to July 1, 1928. As regards the propriety of this particular provision, when the Long Island is not to pay any part of the taxes or interest on the original station investment, the applicants explain that any station improvements made subsequent to July 1, 1928, would probably be in large part for the benefit of the Long Island. The assumption seems questionable, and Article IV, A, (b), of the contract should be revised accordingly to exclude station improvements as an element in the Long Island rental payment.

As in the agreement of November 13, 1928, disapproved by us, the term of the new contract is 20 years, with provision for continuation from year to year thereafter unless terminated by at least six months' notice by either party. The effective date is January 1, 1931. At the ends of 5-year periods, and upon 60 days' written notice, either party may seek a modification in the rate of interest for rentals or in the bases upon which such interest *are* computed, and in the event the parties are unable to agree in respect of any such proposed modifications the question shall be submitted to arbitrators in the manner provided for in a later article of the contract. This clause was mentioned [fol. 98m-4] but not criticised in former reports. It would leave the applicants, which are closely affiliated, a large

measure of freedom in changing important terms of the contract after the expiration of five years. To avoid this undesirable situation, the term of the contract as stated in Article XIII should be changed from an initial period of 20 years to one of five years, and Article VI of the agreement should be omitted. Any substantial modification proposed in the terms and conditions of this operation should be covered by a new agreement and an appropriate application should be made to us for authority to operate under such terms.

The effect of introducing the terms of the agreement of December 23, 1930, now before us, may be seen from the following comparison:

Total Payments by Long Island

	Present basis	Proposed basis
1928:		
Interest, zones 1, 2, and 3	$1,361,842	$1,941,318
Taxes, zones 1, 2, and 3	550,398	550,398
Operation, zones 1, 2, and 3	459,902	902,105
Power	324,416	334,686
Direct charges	138,623	138,623
Totals	2,835,181	3,867,130
1929:		
Interest, zones 1, 2, and 3	1,332,940	1,905,899
Taxes, zones 1, 2, and 3	547,276	547,276
Operation, zones 1, 2, and 3	448,906	934,220
Power	331,253	341,006
Direct charges	131,591	131,591
Totals	2,791,966	3,859,992
1930:		
Interest, zones 1, 2, and 3	1,386,153	1,979,425
Taxes, zones 1, 2, and 3	571,184	571,184
Operation, zones 1, 2, and 3	476,873	885,392
Power	362,562	372,799
Direct charges	121,425	121,425
Totals	2,918,197	3,930,225

The wheelage ratios, representing the proportion of Long Island cars handled in each of the three zones in 1930, were Zone 1, 42.08 per cent; zone 2, 60.49 per cent; zone 3, 7.65 per cent.

It is noted that the major part of the increase of more than $1,000,000 in the Long Island's annual rental under the new proposal is brought about by the change in interest rate from 4 and 4.5 per cent to a uniform rate of 5.75 per cent, and by the charging of 20 per cent of the operating expenses of the station to the Long Island. In connection

with the first of these proposed changes, the applicants cite the commission's finding that 5.75 per cent will constitute a fair return upon the aggregate value of railway property in all rate groups or territories. Reduced Rates, 1922, 68 I. C. C. 676. With respect to this argument, it may be suggested that the general ruling cited does not necessarily apply to individual terminal properties or to contractual relations between carriers without regard to special circumstances. Under the lease of the Terminal Company's property to the Pennsylvania, authorized by us in Acquisition by P. R. R., 145 I. C. C. 283, the Pennsylvania pays [fol. 98m-5] 5 per cent on $50,000,000 par value of capital stock of the Terminal Company, and 4.5 per cent on $58,600,577 principal amount of its bonds. As was stated in our prior report in the instant case, the average cost of money during the period when the terminal was constructed was about 5 per cent. Various rates of interest on investment are incorporated in trackage contracts which have come before us for approval, but circumstances differ and no universal, fixed rate is practicable or desirable. In the situation here, the facts show that a uniform rate of 5 per cent would be just and reasonable to both parties.

Objection is raised to the introduction of the station operating and maintenance expenses into the Long Island's rental as now proposed, on the grounds that such small part of these expenses with which the Long Island would be properly chargeable, considering its alleged slight use of this extensive and elaborate station, is more than outweighed by adopting the wheelage method in fixing the rental of the facilities which are at track level, i. e., facilities other than the station building above track level. Objection is also raised to the inclusion of all the land in zone 1 in the investment upon which the Long Island pays interest.

In the existing agreement, the Transit Commission approved the use of the wheelage method for these other facilities only because any injustice of that method to the Long Island was considered to be mitigated by omitting all interest, taxes, and operating charges in connection with the station building, and further, by computing interest at only 4 per cent on the investment in such other facilities within the three zones. As explaining their objection to the wheelage ratio, the interveners point to the steadily increasing

traffic of the Long Island up to the present time, while the Pennsylvania's passenger business remained the same or decreased, and to the constant increase in the Long Island's rental based on the rising wheelage ratio, without regard to the additional actual costs which that carrier's increased traffic may have caused. The Transit Commission points out that the elimination of station operation, interest, and taxes, for which elimination it was responsible in 1925, represented $741,762 in annual charges to the joint account. Outside the station building, the low rate of interest accounts for further elimination of charges to which the wheelage ratio would apply. These mitigating factors were considered to offset the objections to using the wheelage method of apportionment, particularly when the taxes and the operating expenses represented facilities more extensive than the Long Island would require for its service. The wheelage method is held largely accountable for the increase of nearly $100,000 a year in the Long Island's rental payments since 1924, and it is true that there has been a steady and substantial increase in the proportion of Long Island cars. There has also been an increase in the basic costs, but not to a corresponding degree.

It is contended that the mitigating factors reflected in the terms of the present agreement would be much impaired by the requirement that the Long Island shall pay 20 per cent of the operating expenses of the station, thereby adding more than $400,000 to the present annual rental charge. The applicants' distribution of the operating cost of the station was questioned, the above mentioned expenditure was stated to be more than the Long Island's operation could possibly entail, and attention was called to the contingency that the Long Island would be required to pay this fixed proportion of a total expense which would vary with the Pennsylvania's rather than the Long Island's activities. According to some of the applicants' testimony, [fol. 98m-6] 20 per cent is less than either the square-foot or cubic foot proportion which the exit concourse in the station bears to the total building. In his first proposed report the examiner suggested that an equitable division of the terminal above track level would be approximated by assigning to the Long Island such part of the entire building as is represented by the exit concourse, and that this ratio should be used in determining the Long Island's pro-

portion to such total station expenses as could not be assigned directly to either carrier. On this basis, the proposed allocation is apparently not disadvantageous to the Long Island. With respect to the car movements in zone 1, the proposed 20 per cent is less than one-half the proportion of Long Island car movements at the present time. With respect to the total number of passengers using the terminal, of which number about 82 per cent are Long Island passengers, the proposed ratio is extremely low. As has been explained in former reports, there is no exact method by which the use of the station building as a whole may be divided between the Long Island on the one hand and the Pennsylvania and its other tenant carriers on the other hand. The extensive testimony pertaining to this question only emphasizes the fact that no mathematical solution of the problem can be expected. But the adoption of a fairly approximate basis of apportionment of operating expenses is nevertheless possible. From all the evidence and agreements presented, the proposed 20 per cent apportionment of station expenses cannot be found unreasonable, and it may be properly retained as a provision of the contract.

For the facilities other than the station, the application of the wheelage ratio to total interest, taxes, and operating charges, in the manner prescribed both by the present and proposed contracts is evidently the most convenient and practicable measure of use that is available. Notably in the case of the tunnels in zone 2, a closer approach to a division of the facilities on a physical basis could be worked out. But it would be difficult to reach a satisfactory result based on the different requirements of the Long Island and the Pennsylvania for terminal facilities in New York City, and the difference in traffic density and in unit costs of operation. The Transit Commission, as has been explained, considers that the terms of the present agreement provide a balance between the results of using the wheelage ratio and those produced by leaving the station building entirely out of the rental and adopting a low rate of interest for the other facilities. That commission insists that its jurisdiction is exclusive, and it opposes any changes in the contract increasing the Long Island rental. The ap-

plicants have withdrawn their first proposal to apply the wheelage ratio to the investment cost, taxes, and operating expense of the station above track level and the service plant. The new proposal in this respect, and influenced by the interest rate of 5 per cent which we shall authorize, is, in our opinion, a fair adjustment of the various considerations involved. As regards the Long Island's actual need of, and real benefit from, this city terminal, we are inclined to the belief that the advantages of the facilities have been unduly minimized by the interveners, and are important enough to outweigh any alleged injustice which the present proposal, as modified, may be thought to impose upon the Long Island.

In connection with rents and concessions, no reason is apparent for not crediting the joint account with the revenues received from the track level concessions as was proposed to be done in the original application. In 1930, these revenues amounted to $24,447 in zone 2, and $66,025 in zone 3. The theory upon which the station concessions were eliminated in connection with the station clearly does not apply to zones 2 and 3, for the reason that in those zones the Long Island would be obligated to pay a rental covering interest on cost, and taxes. Article IV should include an appropriate provision for crediting rents and concessions in zones 2 and 3.

[fol. 98m-7] It is unnecessary to repeat what was said in our prior report with respect to our jurisdiction. The agreement under the terms of which the Long Island operation is being carried on can not be assumed to be controlling even though approved by the Transit Commission.

Upon the facts presented on the record, including the further hearing and argument, we find that the present and future public convenience and necessity require the continued operation of The Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company, the Pennsylvania Railroad Company lessee, as described, provided the terms and conditions of the proposed operating agreement be modified in the respects and to the extent herein indicated.

An appropriate certificate and order prescribing conditions will be issued.

[fol. 98m-8] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

Long Island R. Co. Trackage

CERTIFICATE AND ORDER—Feb. 8, 1932

Hearings and investigation of the matters and things involved in this proceeding having been had, and said division having, on March 18, 1930, and on the above date, made and filed reports containing its findings of fact and conclusions thereon, which reports are hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue in Sunnyside yard, and the Pennsylvania station, New York, N. Y., including the joint use of said yard, station, and appurtenant facilities described in the record, under the terms and conditions of the proposed joint operating agreement dated December 23, 1930; Provided, however, and this certificate is issued upon the express condition, that said terms and conditions be modified in the respects and to the extent indicated in the accompanying report, to-wit: In ascertaining currently the rental payable, additions and betterments to the Pennsylvania station building and service plant made subsequent to July 1, 1928, shall be excluded; the term of the aforesaid agreement shall be five years, with provision for its extension from year to year unless terminated by at least six months' notice by either party to the other; Article VI of the proposed contract shall be omitted; the rate of interest to be applied on the investment cost of all jointly used property and facilities, according to the provisions of said agreement which are not otherwise affected by the changes herein prescribed, shall be 5 per cent per annum; and, the joint accounts of the parties shall be credited currently with all revenues from rents, privileges, and concessions within zones 2 and 3.

It is ordered, That, if within 60 days from the date hereof, The Long Island Railroad Company and The Penn-

sylvania Railroad Company shall jointly file with this commission written notice of the acceptance by them of the foregoing conditions, this certificate shall take effect and be in force from and after 30 days from the filing of said acceptance; and in such event the said carriers, within 30 days from the date of such acceptance, shall file with this commission duly verified copies of the joint operating agreement as modified in accordance with said conditions and executed.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 98n-1] BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

In the Matter of the Application of THE PENNSYLVANIA RAILROAD COMPANY, Lessee of the Pennsylvania Tunnel and Terminal Railroad, and THE LONG ISLAND RAILROAD COMPANY, under Paragraph (18) of Section 1 of the Interstate Commerce Act, for a Certificate of Public Convenience and Necessity Authorizing the Latter Company to Operate, under Trackage Rights, Over That Portion of the Pennsylvania Tunnel and Terminal Railroad from Near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, to Pennsylvania Station, Borough of Manhattan, City and State of New York, Including the Use of said Yard and Station and the Facilities and Appurtenances thereof, and for an Order, under Paragraph (4) of Section 3 of said Act, Requiring the use of said Tracks and Terminal Facilities by the Long Island Railroad Company on Terms and for Compensation Agreed Upon by the Pennsylvania Railroad Company and the Long Island Railroad Company

PETITION FOR REARGUMENT

Comes now the intervener, the Transit Commission of the State of New York, in the above-entitled proceeding and respectfully petitions the Commission (1) to grant a [fol. 98n-2] reargument or rehearing therein as to the mat-

ters determined by the certificate and order of Division 4, dated February 8, 1932, and (2) to suspend the effective date of said certificate and order until further order of the Commission, pending the hearing and determination of this application; and in support of this petition respectfully shows:

I. That the said certificate and order of Division 4 is null and void because beyond the scope of the jurisdiction of the Commission, in that the Interstate Commerce Act, section 1, paragraph (18), confers no power upon the Commission.

1. to require or grant a certificate of public convenience and necessity for operation under a trackage agreement.

2. to deal with such operation begun prior to the enactment of said paragraph (18) section 1 and continuously conducted thereafter.

3. to assume control over the terms of such trackage agreement, by purporting to make the grant of said certificate conditional upon a change in the terms of said agreements, or

4. to set aside the existing terms and conditions of operation, which were lawfully sanctioned by the Transit Commission, without any proof or finding that such terms and conditions burden or interfere with interstate commerce.
[fol. 98n-3] II. That the full Commission has never held that it has power to regulate the terms of a trackage agreement, by making the issuance of a certificate of public convenience and necessity conditional upon a modification of the terms of the existing trackage agreement.

III. That the Commission has expressly held that applications for a certificate of public convenience and necessity in the case of trackage agreements only do not fall within the jurisdictin conferred by said paragraph (18) of section 1; and has issued such certificates in such cases only where no representations or objections were made, for the purpose of preventing any question from arising as to the legality of such operation.

IV. That the Commission has held that, under the latter portion of said paragraph (18) of section 1, it may deny an application for leave to abandon operation originally carried on pursuant to a trackage agreement which had

expired; but has held that it had no authority to adjust the rental or the terms and conditions of the agreement.

V. That the Commission has expressly held that no certificate of public convenience and necessity is required where the operation began prior to the enactment of paragraph (18) of section 1.

[fol. 98n-4] VI. That the Commission has raised no objection to the operation, under trackage rights, of the Lehigh Valley Railroad Company into the Pennsylvania Station, New York City, although the trackage agreement therefor, made in 1924, expired in 1928, and has taken no steps to regulate the terms and conditions under which it is now operating; and that in numerous other instances has not concerned itself with operation under trackage rights.

VII. That the Commission is without power to prevent the parties from immediately agreeing to change the terms of any agreement which it may approve, or to so limit the contractual powers of the parties as to make it impossible for them to enter into such new agreement.

VIII. That the effect of the Commission's proposal, by attempting to make changes in the agreement a matter solely for the parties or for the parties and the Commission, would be to deprive the State of New York of the right to make representations, conferred upon it by paragraph (19) of section 1 of the Interstate Commerce Act, and to destroy any assurance that the State would enjoy that right of making representations.

Wherefore this intervener prays that a reargument or rehearing be granted in the above-entitled case; that, [fols. 98n-5 & 98o] pending the hearing and determination of this application, the effective date of said certificate and order of Division 4 be suspended until further order of the Commission; and that the Commission enter such further order or orders in the premises as to it may seem just and reasonable.

Dated at New York City, N. Y., February 26, 1932.

Transit Commission, by William G. Fullen, Chairman, 270 Madison Avenue, Borough of Manhattan, City and State of New York. George H. Stover, Counsel, 270 Madison Avenue, Borough of Manhattan, City and State of New York.

[fol. 98p] [Stamp:] Filed Mar. 12, 1932, Interstate Commerce Commission

A. D. 7308

Agreement Between The Pennsylvania Railroad Company and The Long Island Railroad Company, Dated March 10th, 1932

Granting Trackage Rights to the Long Island Railroad Company Over the Tracks of the Pennsylvania Tunnel and Terminal Railroad Between Sunnyside Yard, Long Island, and Pennsylvania Station, New York City, Including the Use of said Yard, Station, and Facilities

[fol. 98p-1] This agreement made this 10th day of March, in the year of our Lord One thousand nine hundred thirty-— (A. D. 1932) between The Pennsylvania Railroad Company, a Corporation of the State of Pennsylvania, Lessee, in possession of and operating the railroad and properties of Pennsylvania Tunnel and Terminal Railroad Company, party of the first part, and hereinafter designated "Pennsylvania Company" and The Long Island Railroad Company, a Corporation of the State of New York, party of the second part, and hereinafter designated "Long Island Company."

Whereas, by virtue of a certain indenture of lease bearing date the Fourteenth day of June, A. D. 1928, made and executed by Pennsylvania Tunnel and Terminal Railroad Company, as Lessor, and The Pennsylvania Railroad Company, as Lessee, said The Pennsylvania Railroad Company is in possession of and operating the railroad situate in the States of New Jersey and New York extending from a connection with the tracks of the United New Jersey Railroad and Canal Company in the Township of Kearney, County of Hudson, State of New Jersey, about two miles east of the center of Market Street, Newark, in said State of New Jersey, and extending eastwardly—generally through tunnels under the Hudson River, the Borough of Manhattan and the East River—to the Borough and County of Queens, City and State of New York, where it connects with the railroad of The New York Connecting Railroad Company; and a branch known as the Harrison Branch extending

from a point on the main line about one-quarter of a mile east of the western end thereof, about one mile to or toward the town of Harrison, County of Hudson, State of New Jersey; together with all of the sidings, tunnels, extensions, branches and all stations, depots, buildings, appurtenances and property of whatsoever kind and wheresoever situate now owned or which may be hereafter acquired by said Pennsylvania Tunnel and Terminal Railroad Company;
[fol. 98p-2] And whereas, said The Long Island Railroad Company desires to acquire the right to use jointly with said The Pennsylvania Railroad Company, the railroad tracks, stations and facilities hereinafter mentioned, and The Pennsylvania Railroad Company is willing, upon and subject to the agreements, covenants, terms and conditions hereinafter set forth, to grant such right to The Long Island Railroad Company;

Now, therefore, this agreement witnesseth, That in consideration of the premises and of the payments to be made by the Long Island Company to the Pennsylvania Company as hereinafter provided, and in further consideration of the covenants and agreements hereinafter set forth to be kept and performed by each of the parties hereto, the parties hereby mutually covenant and agree each with the other as follows, to-wit:

First. The Pennsylvania Company, subject to all of the terms, conditions, stipulations, limitations and restrictions contained in the franchise, dated October 9th, 1902, granted to the Pennsylvania, New York and Long Island Railroad Company (one of the constituent Companies of the Pennsylvania Tunnel and Terminal Railroad Company) by the Board of Rapid Transit Railroad Commissioners for the City of New York, hereby grants to the Long Island Company for and during the term hereinafter specified trackage rights over the following tracks, and the right to use the following facilities and appurtenances for handling its passenger, baggage, mail and express traffic, but subject to the terms, conditions, limitations and restrictions hereinafter set forth: (a) Pennsylvania Station and yard between Tenth and Sixth Avenues, Borough of Manhattan, New York City; (b) the approaching tunnels and tracks eastward from Sixth Avenue to Harold Avenue in the Borough of Queens, where connection is made with the railroad of

the Long Island Company; and if and when desired by the Long Island Company (c) Sunnyside Yard and adjacent facilities in the Borough of Queens.

Second. The Pennsylvania Company will, from time to time, add to said portion of said railroad, Pennsylvania [fol. 98p-3] Station, Sunnyside Yard, and facilities and appurtenances, to be used by the Long Island Company hereunder, such additions, betterments and improvements as may be mutually determined between the parties hereto, except that the Pennsylvania Company may make, at any time, without the approval of the said Long Island Company such additions, betterments and improvements as in the judgment of the Directors of the Pennsylvania Company may be required by Federal, State or Municipal enactments or regulations, and also such as may in their judgment be necessary for the protection of the railroad and property covered by this agreement.

Third. For the purpose of defining the railroad facilities and appurtenances of the Pennsylvania Company to be used by the Long Island Company, and for the keeping of proper accounts for the business handled thereover and thereon by the respective parties hereto, said railroad, facilities and appurtenances shall be divided into the following sections, as shown on the map hereto attached and made a part hereof, and the value as of July 1st, 1928, agreed upon for each of said sections for the purposes only of this agreement in determining the rental to be paid, as hereinafter provided, shall be as follows:

1. Pennsylvania Station, Borough of Manhattan, City of New York, building above the track level and one-half the service plant	$15,000,000.00
2. Pennsylvania Station and Yard at and below the track level between Tenth and Sixth Avenues	31,896,746.94
3. The approaching tunnels and tracks eastward from Sixth Avenue to Harold Avenue in the Borough of Queens	32,605,521.38
4. Sunnyside Yard and adjacent facilities in the Borough of Queens	8,623,170.90

Fourth. The Long Island Company covenants and agrees to use and avail itself of the rights hereby granted by the Pennsylvania Company under and subject to the terms, [fol. 98p-4] conditions and stipulations of this agreement, and to pay as rental therefor in each and every month during the continuance of this agreement:

A. Such proportion of the several items in this article hereinafter mentioned as the number of cars and engines of the Long Island Company in and over Sections 2, 3 and 4 of the railroad described in Article Third hereof in each month shall bear to the total number of cars and engines therein and thereover during such month, ~~each~~ engine to be counted as three cars. Switching movements between the Pennsylvania Station and Sunnyside Yard with the exception of movements of engines and cars necessary for the arrangement or make-up of trains in said station or in said yard, but not passing from one section to another section, shall be included in computing the number of cars and engines in Sections 2 and 3 as set forth in Article Third hereof:

(a) One-twelfth of the annual interest at the rate of 5% per annum upon the valuation of Sections 2, 3 and 4 as set forth in Article Third hereof.

(b) One-twelfth of the annual interest at the rate of 5% per annum on the cost of additions, extensions, improvements and betterments which may from time to time be made after July 1st, 1928, to said railroad, station, yards and their facilities and appurtenances exclusive of the Pennsylvania Station building above the track level and service plant.

(c) The cost and expense of operation, maintenance and renewals of those parts of said railroad, yards and their facilities and appurtenances described in Article Third hereof as Sections 2, 3 and 4 and of the additions, extensions, improvements and betterments thereto; taxes, cost of insurance and cost of lighting tracks and track crossings, watchmen and any other expenditure imposed by state, federal and municipal enactments or regulations to be included in maintenance and operation; less receipts from privileges, rents and concessions in Sections 2, 3 and 4.

The insurance designated and specified in paragraph (c) above, shall not include any charge for the insurance of rolling stock against fire, but the latter must be borne and [fol. 98p-5] paid for by the Company owning such rolling stock or using the same in its service.

B. The party of the second part shall not be called upon to pay any part of the interest upon the valuation of Section 1, as set forth in Article Third hereof or of the taxes levied thereon. The party of the second part shall pay in each and every month 1/5 of the cost and expense of operation, maintenance and renewals of the station building and its facilities and appurtenances as described in Article Third hereof as Section 1. For the purpose of this agreement the expenses of operation, maintenance and renewals of said Section 1 shall be deemed to be the charges to the accounts station and office buildings, station employees and station supplies and expenses, as described in the classification of operating revenues and operating expenses of steam roads prescribed by the Interstate Commerce Commission. Taxes in said Section 1 shall be deemed to be the taxes levied by the City of New York on the assessed valuation of the station building, and one-half the taxes on the assessed valuation of the service plant. Inasmuch as The Long Island Railroad Company is not charged with the interest and taxes of the station building described as said Section 1 as hereinabove recited, it shall not be credited with the receipts from any station privileges, rents or concessions in the said station, but the joint account shall be credited with the receipts from privileges, rents and concessions in Sections 2, 3 and 4.

Fifth. All engines and cars shall be propelled and operated by electricity and in such system and manner as the Pennsylvania Company shall approve. The Pennsylvania Company covenants and agrees to furnish the necessary distributing system and supply the current from its power house to contact shoes on the equipment of the Long Island Company—the said distributing system to embrace the necessary transmission lines, substations, storage batteries, working conductors and appurtenances thereof—proper and necessary to enable the Long Island Company to move its trains on the portion of the said railroad of the

Pennsylvania Company over which it is hereby granted trackage rights, and in said Pennsylvania Station and [fol. 98p-6] Sunnyside Yard, and for the supply of such current, and the distributing system and service connected therewith, the Long Island Company shall, and hereby covenants and agrees to, pay as rental therefor, in each and every month during the continuance of this agreement, to the Pennsylvania Company, such proportion of the several items in this Article hereinafter mentioned as the number of its cars and engines thereon, therein and thereover in each month shall bear to the total number of cars and engines thereon, therein and thereover during such month—each engine to be counted as three cars. Switching movements between the Pennsylvania Station and Sunnyside Yard, with the exception of movements of engines and cars necessary for the arrangement or make-up of trains in said station or in said yard but not passing from one section to another section, shall be included in computing the number of cars and engines in Sections 2 and 3 as described in Article Third hereof:

(a) One-twelfth of the annual interest, at the rate of 5% per annum on $10,356,032.03, being the value as of July 1st, 1928, agreed upon for the purposes only of this agreement in determining the rental to be paid of such distributing system and of all its ramifications and appurtenances, including the power house.

(b) One-twelfth of the annual interest, at the rate of 5% per annum, on the agreed cost of all additions, extensions, improvements and betterments which may, from time to time, after July 1st, 1928, be made to said distributing system and to all its ramifications and appurtenances, including the power house.

(c) That proportion of the operating expenses, including taxes, rents and easements, insurance, replacements and depreciation, and expenditures imposed by Federal, State or Municipal enactments or regulations, incurred by the Pennsylvania Company in generating and transmitting the electric current to contact shoes on the equipment of the Long Island Company: less receipts from current furnished to the Long Island Company for purposes other than handling its trains over the portion of the said rail-

road and in the said Pennsylvania Station and Sunnyside Yard, and similar receipts from current that may be fur- [fol. 98p-7] nished to other parties for purposes other than the propulsion of trains.

Sixth. The bills against the Long Island Company for the rental and expenses prescribed by Articles Fourth and Fifth shall be rendered not later than the twentieth day of each month for the business of the preceding month, and payment thereof, without abatement, shall be made not later than the last day of each calendar month in which the bill is rendered. If any question or dispute shall arise as to any such bills, either Company shall have the right to examine the books and records of the other to verify the settlement required to be made thereunder, but such dispute shall not delay the payment of bills as rendered, and any adjustment necessary by reason thereof shall be made in the accounts of subsequent months.

Seventh. If the Long Island Company, its successors or assigns, shall make default in whole or in part, in any payment prescribed and required by this agreement for the space of ninety days, or shall make default in the performance of any covenant or obligation herein contained or hereby imposed upon it for the space of ninety days after the service upon it of written notice of such default, then and in either such case, at the option of the Pennsylvania Company, all rights and privileges conferred by this agreement on the Long Island Company shall cease, terminate and be absolutely extinguished; provided, however, that such termination shall not affect the right of said Pennsylvania Company to enforce payment, by legal process, of money then due and unpaid by it, with interest upon all deferred or delayed payments at the rate of five per centum (5%) per annum.

Eighth. The Pennsylvania Company shall provide for the movement over said portion of the railroad of such trains as the Long Island Company shall desire to move under this agreement and as nearly in accordance with the wishes of the Long Island Company as the same can be done without unreasonable interfering with its own trains of the same class, and shall, if necessary, place such trains of the Long Island Company upon its schedules, and in

arranging schedules the Pennsylvania Company shall not [fol. 98p-8] discriminate against the trains of the Long Island Company, but shall give them equal rights with its own trains of the same class.

The trains, engines and employes of the Long Island Company, while upon the railroad of the Pennsylvania Company, shall be subject to the regulations and orders of the Superintendent or other proper officer of that Company; and to secure uniformity in time, rules and signals, the Long Island Company agrees to adopt and use on said line of railroad the standard time, train rules and signals that may be in use from time to time by the Pennsylvania Company.

Ninth. The trackage rights over, and the use of said railroad, Pennsylvania Station and Sunnyside Yard, and the facilities and appurtenances thereof, hereby granted to the Long Island Company, are so granted with the understanding and upon the express condition that the Long Island Company shall assume all risks and liabilities for injury, loss or damage to its own trains, engines, cars and property in its charge, its passengers and employes, and also to all other persons and property, including the Pennsylvania Company, injured or damaged by, about, or incident to the operation of its trains, business or traffic from any cause whatsoever, and said Long Island Company hereby expressly covenants and agrees to protect, indemnify and save harmless the Pennsylvania Company against any and all loss, claims or demands in consequence of, or growing out of, such injury, loss or damage, however arising or occurring.

Where, however, loss or damage to their property is sustained by the parties hereto through their joint negligence, then the Pennsylvania Company and the Long Island Company, respectively, shall bear their own loss, but loss or damage sustained by third persons—other than passengers and employes of the Long Island Company, and the persons and property described and defined in the preceding paragraphs of this Article—by such joint negligence shall be borne equally by the Pennsylvania Company and the Long Island Company. If any other claims, loss of damage arise, the same shall be considered and charged as part of the cost of maintenance and operation and included

in the monthly accounts thereof and apportioned between [fol. 98p-9] the parties hereto as provided in Articles Fourth and Fifth with respect to expenses of maintenance and operation.

Superintendents, managers, agents, telegraph operators, train dispatchers, section foremen, or laborers, watchmen, switchmen, or any other persons subordinate to the President employed in, or charged with, the maintenance or care of or operation of the property aforesaid shall in respect to the liability of the parties using said railroad, Pennsylvania Station and Sunnyside Yard, facilities and appurtenances, to each other or to third persons, growing out of the fault or neglect of such officers, agents, or employes, be deemed and held to be the sole servants of that party to, or upon or in connection with, whose trains, business, traffic, or property any loss or damage may have occurred. Any employe below the rank of Superintendent of either of the parties to this agreement, shall at any time be removed from service, on, or in connection with, the railroad and property mentioned herein, upon complaint, in writing, addressed to the General Manager of the party employing the individual complained of by the General Manager of the other party; but such removal shall not prevent the employment elsewhere of the individual so removed.

Tenth. The Long Island Company agrees that it will not use the said railroad, Pennsylvania Station, Sunnyside Yard and their facilities and appurtenances for the accommodation of any passenger, baggage, mail, express, or other traffic handled in passengers trains, which, or in such manner as may injuriously affect the interests of the Pennsylvania Company; nor will it at any time sell, assign or in any manner transfer or underlet all or any part of the rights and privileges by this agreement secured to it, without the consent in writing of the said Pennsylvania Company; it being understood that the Long Island Company shall not by any practice or device use, or permit others to use, the said railroad, Pennsylvania Station, Sunnyside Yard, and the facilities and appurtenances of the Pennsylvania Company, under any conditions, whether resulting from consolidations, transfers of ownership, construction of new lines or extension of existing lines or otherwise, if

such conditions have the effect of violating the provisions or intent of this Article.

[fol. 98p-10] In the event that in the judgment of the Pennsylvania Company, the Long Island Company shall at any time violate the intent or any of the provisions of this Article, such violation, upon notice from said Pennsylvania Company, shall be immediately discontinued, and if continued or controverted, the question shall be submitted for arbitration in the manner hereinafter in this agreement provided, and the judgment of the arbitrators in respect to the practice complained of shall be considered to have the effect of, and shall be enforceable as a specific covenant of this agreement.

Eleventh. In case of any difference of dispute arising under this agreement, the parties hereto agree to submit the same to two arbitrators, one of whom shall be appointed by the Pennsylvania Company and the other by the Long Island Company, and if these arbitrators cannot agree they shall select a third disinterested and competent person, and their decision, or that of a majority of them, shall be final and conclusive between the parties hereto. In case either of the said Companies shall fail to appoint an arbitrator as aforesaid, for the period of twenty (20) days after written notice given by the other Company to make such appointment, then and in that event the arbitrator appointed by the Company not in default shall appoint an arbitrator of like experience and skill for the defaulting Company, and the said two arbitrators so appointed shall select a third arbitrator, and the three so chosen shall hear and decide such differences, and their decision, or that of a majority of them, shall be final and conclusive upon the parties to this agreement.

Twelfth. Subject to the approval of the Interstate Commerce Commission, the rights and privileges hereby granted to the Long Island Company by the Pennsylvania Company shall be effective and exercisable as of the first day of January, 1931, and shall continue in full force and effect for the term of five (5) years from said date, and thereafter from year to year unless terminated either at the end of said five (5) year period or at the end of any subsequent year by six months' prior notice in writing by either the Long Island Company or the Pennsylvania Company to the other,

[fol. 98p-11] when each and every right and privilege conferred under this agreement shall accordingly cease and terminate.

Any agreement or arrangement heretofore existing providing for the use by the Long Island Company of any of the tracks, station, yards, facilities and appurtenances covered by this agreement shall be in all things superseded by this agreement as of January 1st, 1931.

In Witness Whereof, the said parties have caused their respective corporate seals, duly attested, to be hereunto affixed the day and year hereinabove written.

The Pennsylvania Railroad Company, Lessee, by F. J. Fell, Jr., Vice-President. Attest: J. Taney Willcox, Secretary. (Seal.) The Long Island Railroad Company, by A. J. County, Vice-President. Attest: J. G. Watson, Asst. Secretary. (Seal.)

[fol. 98p-12] STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

I, J. Taney Willcox, do depose and say that I am Secretary of The Pennsylvania Railroad Company, one of the Corporations which executed the foregoing agreement; that I know F. J. Fell, Jr., who signed said agreement as Vice-President of the said Corporation; that on the date of such execution the said F. J. Fell, Jr., was a Vice-President of the said corporation; that I know the seal of the said Corporation; that the seal affixed to the said agreement is the seal of the said Corporation and that F. J. Fell, Jr., signed the said agreement and the seal of the Corporation was affixed thereto by order of the Board of Directors of the said Corporation, and I signed my name thereto by like order of the Board of Directors.

J. Taney Willcox.

Sworn and subscribed to before me, a Notary Public, this 10th day of March, 1932. My commission expires March 9, 1935. J. E. Williams, Notary Public. (Seal.)

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

I, J. G. Watson, do depose and say that I am Assistant Secretary of The Long Island Railroad Company, one of the Corporations which executed the foregoing agreement; that I know A. J. County, who signed said agreement as Vice-President of the said Corporation; that on the date of such execution the said A. J. County was a Vice-President of the said corporation; that I know the seal of the said Corporation; that the seal affixed to the said agreement is the seal of the said Corporation and that A. J. County signed the said agreement and the seal of the Corporation was affixed thereto by order of the Board of Directors of the said Corporation, and I signed my name thereto by like order of the Board of Directors.

J. G. Watson.

Sworn and subscribed to before me, a Notary Public, this 10th day of March, 1932. My commission expires March 9, 1935. J. E. Williams, Notary Public. (Seal.)

(Here follows plan accompanying agreement, side folio 98p-13.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

[fol. 98q] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7308

LONG ISLAND RAILROAD COMPANY TRACKAGE

ORDER DENYING PETITION FOR REARGUMENT—March 14, 1932

Upon further consideration of the record in the above entitled proceeding, of the petition of the Transit Commission of the State of New York, intervener, for reargument or rehearing, and of the answer to said petition by the Pennsylvania Railroad Company and the Long Island Railroad Company.

It is ordered that the petition of the Transit Commission of the State of New York be, and it is hereby, denied.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 98r] I. C. C. Finance Docket No. 7308

In the Matter of the Application of THE PENNSYLVANIA RAILROAD COMPANY, Lessee of the Pennsylvania Tunnel and Terminal Railroad, and THE LONG ISLAND RAILROAD COMPANY, under Paragraph (18) of Section 1 of the Interstate Commerce Act, for a Certificate of Public Convenience and Necessity Authorizing the Latter Company to Operate, under Trackage Rights, over that Portion of the Pennsylvania Tunnel and Terminal Railroad from near Harold Avenue, in Sunnyside Yard, Borough of Queens, Long Island, to Pennsylvania Station, Borough of Manhattan, City and State of New York, Including the Use of said Yard and Station and the Facilities and Appurtenances Thereof, and for an Order, under Paragraph (4) of Section 3 of said Act, Requiring the Use of said Tracks and Terminal Facilities by the Long Island Railroad Company on Terms and for Compensation Agreed Upon by the Pennsylvania Railroad Company and the Long Island Railroad Company

To the Interstate Commerce Commission:

In compliance with the certificate and order in this proceeding made February 8, 1932, the Pennsylvania Railroad Company and the Long Island Railroad Company now

jointly file with the Commission this written notice of the acceptance by them of the condition set forth in said certificate and order.

F. J. Fell, Jr. Vice-President Pennsylvania Railroad Company. G. LeBoutillier, Vice-President Long Island Railroad Company. Alfred A. Gardner, Counsel.

Dated New York, N. Y., March 2nd, 1932.

[fol. 99] In United States District Court, Southern District of New York

1

Transit Commission, Petitioner,

against

The United States of America, The Long Island Railroad Company, and The Pennsylvania Railroad Company, Respondents, and Interstate Commerce Commission, Intervening Respondent.

2

The State of New York, Petitioner,

against

Same

Before Augustus N. Hand, Circuit Judge, and William Bondy and Robert P. Patterson, District Judges

Opinion—Filed Oct. 3, 1932

The foregoing suits were instituted pursuant to 28 U. S. C. §41 and §43 to §48 inclusive to set aside and annul an order and certificate of the Interstate Commerce Commission made February 8, 1932. They came before the above court upon a motion for an injunction pendente lite and also on final hearing. After making an order of consolidation the court reserved decision on the motion for the preliminary

injunction and received in evidence the record before the [fol. 100] Interstate Commerce Commission, whereupon all parties rested.

Ever since the completion of the Pennsylvania Railroad Company's station in the Borough of Manhattan in 1910, the Long Island Railroad Company has been operating its trains into the Pennsylvania Station, under a trackage agreement approved by the New York State authorities. The station is the Eastern Terminal of the Pennsylvania system. In addition to the station building and yard situated at midtown Manhattan, the terminal property consists of two single track tunnels which run in a westerly direction under the city and Hudson River into New Jersey, and four single track tunnels which run in an easterly direction under the City and East River to Long Island and the Sunnyside Yards in Queens.

There are three zones: the first consisting of the Pennsylvania Station and the station yards to the west of Sixth Avenue in Manhattan; the second, consisting of the tracks, extends east from Sixth Avenue through the East River tunnels and to Harold Avenue in Queens; the third, consisting of the Sunnyside Yards, lies to the north and a little to the east of the most eastward portion of the second zone.

Most of the Pennsylvania trains which carry "commuters" stop in New Jersey where the passengers are transferred to the tubes of the Hudson Terminal, whereby they come into the city. The Pennsylvania trains from a long distance come through the Hudson River tunnels to the station in Manhattan, there unload and thence continue through the East River tunnels to the Sunnyside Yards, [fol. 101] where they are stored, cleaned and repaired and again made up into trains which return under the East River to the station in order to load and proceed westward.

The Long Island trains generally come from the east over the Pennsylvania tracks, under the East River into the Pennsylvania Station, load again and start back east. Since a majority of the passengers are "commuters", a number of these trains remain in the Pennsylvania Station during the middle of the day and at the eastern Long Island terminals during the night.

It is evident from the foregoing that Sunnyside Yards are used for storage principally by the Pennsylvania, while the Manhattan Yards are used for storage principally by

the Long Island. But as the station yards will not hold all the Long Island cars, some are returned to points on Long Island, though the percentage thus returned is small. A few trains are stored at Jamaica. By a decision of the Interstate Commerce Commission on March 18, 1930, it was found that the total number of car movements for 1928 in the three zones was as follows:

	Long Island	Pennsylvania
Zone 1	41.44%	58.56%
Zone 2	59.94%	40.06%
Zone 3	11.60%	88.40%

The legal ownership of the zones where the terminal facilities are situated is in the Pennsylvania Tunnel Railroad Company, but the Pennsylvania Railroad owns all the stock of the Tunnel Company, as well as practically all the stock of the Long Island Railroad.

[fol. 102] Upon the completion of the Pennsylvania Station and Terminals in 1910, the Long Island began to operate over the tracks of the Pennsylvania into the latter's station under a trackage agreement, for which the carriers sought and obtained the necessary permission and approval of the Public Service Commission of the First District of the State of New York. This agreement was modified by another dated June 24, 1912, and the rental payable by the Long Island was, in 1920, and again in 1922, increased with the approval of the Public Service Commission and, (after 1921), of its successor, the Transit Commission.

In 1923 the carriers made application to the Transit Commission for the approval of an amendment to the then existing trackage agreement, which involved a further increase of the rental payable by the Long Island. The Long Island contemporaneously sought to increase its intrastate commutation fares for passengers. Under the terms of the existing agreement, the Long Island was paying to the Pennsylvania, as rental, a share of the operating expenses and taxes (less net revenue from station privileges) on the jointly used facilities east of Tenth Avenue, Manhattan, including the station building, and, in addition, a fixed sum of $300,000 per annum. The amendment proposed in 1923 required that the Long Island share on a wheelage basis in the interest at 4 per cent on the investment in the jointly used facilities and in the station building, instead of paying

the lump sum of $300,000 as before. This amendment was disapproved by the Transit Commission.

In March, 1925, another application to the Transit Commission was made for approval of a trackage agreement [fol. 103] similar to the one rejected, except that this application eliminated from the investment base the sum of $15,000,000 representing the cost of the station building above the track level, and increased the share in the interest from 4 to 5 per cent. This proposed agreement was disapproved by the Transit Commission in May, 1925, but on July 28, 1925, approved upon a reduction of the interest rate by the carriers to 4 per cent. In November, 1925, a further application was made to the Transit Commission to approve an increase of the interest rate to 6 per cent. This was disallowed in December, 1925, but an extension of the agreement as approved July 28, 1925, was granted for one year from January 1, 1926.

In 1929, the carriers applied to the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 1(18) of the Interstate Commerce Act authorizing the Long Island to continue operation at the rental rejected by the Transit Commission in December, 1925, and also for an order under Section 3(4) of that Act requiring the use of the joint facilities at this rental and upon terms which had been embodied in an agreement dated November 13, 1928. The Interstate Commerce Commission held that Section 3(4) was not applicable to a case where one carrier agreed to the use of its facilities by another. It likewise held that it had jurisdiction under Section 1(18), but denied the application without prejudice on the ground that it imposed unreasonable terms.

The carriers thereafter made another application to the Interstate Commerce Commission under Section 1(18). This application eliminated from the investment base $15,000,000 [fol. 104] representing the Station Building above the track level, required the Long Island to pay 20 per cent of the operating expenses of that building and reduced the rate of interest from 6 to 5¾ per cent. On February 8, 1932, the Interstate Commerce Commission granted a certificate of public convenience and necessity, upon condition that the rental upon additions and betterments, made to the Pennsylvania Station after July 1, 1928, should be excluded from the rate base, that the term of the agreement should be five

years instead of twenty years, as applied for, and that the rate of interest on the investment cost of jointly used facilities should be 5 per cent.

In 1932 the present suits were brought to set aside the certificate and order of the Interstate Commerce Commission. Pending their determination, the carriers have continued to operate under the conditions approved by the Transit Commission on July 28, 1925, and formally extended to January 1, 1927.

It is conceded that public convenience and necessity require the continuance of the use by the Long Island of the Pennsylvania facilities and there is no claim that the findings of fact of the Interstate Commerce Commission were unsupported by the evidence.

George H. Stover, Solicitor for New York State Transit Commission; George H. Stover and Philip Hodes, Counsel.

John J. Bennett, Jr., Attorney General of the State of New York, Solicitor for the State of New York; Wendell P. Brown, Assistant Attorney General, Counsel.

George Z. McCabe, United States Attorney, Solicitor for the United States of America; Elmer B. Collins, Special Assistant to the Attorney General, Counsel.

Joseph F. Keany, Solicitor for respondents Long Island Railroad and Pennsylvania Railroad Company; Joseph F. Keany and Alfred A. Gardner, Counsel.

[fol. 105] Daniel W. Knowlton, Solicitor for Intervening respondent, Interstate Commerce Commission, H. L. Underwood, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

The question involved in these suits is whether the Transit Commission or the Interstate Commerce Commission has jurisdiction to pass on the trackage agreements of the Pennsylvania and the Long Island Railroads. This depends on the proper interpretation of Section 1 (18) of the Interstate Commerce Act. The caption of Subdivision 18 of Section 1 is: "Extension or abandonment of lines: certificate required."

Subdivision 18 provides that:

"No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or oper-

ate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

It is contended by the Transit Commission and the State of New York that Subdivision (18) requires a certificate from the Interstate Commerce Commission only where a railroad (1) extends its line, (2) constructs a new line, (3) acquires another line, or (4) engages in transportation "over or by means ofsuch additional or extended line"; and [fol. 106] that the Long Island is not doing any of these things, when it is merely using, jointly with the Pennsylvania, certain existing lines of the latter under a trackage agreement.

The difficulty with this position is that it disregards the broad purposes of the Amendment to the Interstate Commerce Act (of 1920) under which Section 1 (18) was adopted. Its general purpose was to control railroads, whose operations affected interstate commerce, in such a way as to avoid excessive expenditures by the building of unnecessary lines and to prevent injurious competition and the abandonment of useful arteries of commerce. New England Divisions Case, 261 U. S. at p. 189; Texas & Pac. Ry. v. Gulf etc. Ry., 270 U. S. at p. 277; Colorado v. United States, 271 U. S. at p. 161-2; Alabama Ry. v. Jackson Ry., 271 U. S. at p. 249. Operation, whether over newly constructed lines or under trackage agreements over existing lines of another carrier, may substantially affect interstate commerce by affecting the ability of the carriers involved to perform their service as a part of the general transportation system of the country, by unnecessarily duplicating lines, or by causing undesirable expense or other undue burdens.

In view of the settled governmental policy of control of interstate transportation by a single body charged with the duty of supervising it as a whole, it seems reasonable to construe the words "operate any line of railroad," found in Subdivision 18 of Section 1, as embracing any railroad having interstate relations that runs its trains over the lines of another, under a trackage agreement entered into between the two roads. It is true that the clause might be [fol. 107] interpreted as directed only to a railroad owning, leasing or maintaining the tracks used, but it seems hard to justify a definition that would prevent national control of such important arteries of interstate commerce as are railroads using the tracks of other railroads engaged therein. In our opinion the above words are alone sufficient to bring the present case within the jurisdiction of the Interstate Commerce Commission.

Moreover, the words "no carrier" * * * shall undertake the extension of its line of railroad * * * or shall engage in transportation * * * by means of such * * * extended line" fairly cover the proposed contract. It is unreasonable to confine them to cases of the construction, acquisition or maintenance of an extension by an owner. An extension, whether arising out of a trackage agreement for joint use of the lines of another railroad or otherwise, has a vital effect on interstate commerce and requires national control. The same dangers that are to be guarded against when a railroad extends its line for its own use, or leases it for the sole use of another, exist where it agrees to a joint use by itself and another road. Whether there was need of the additional service in the particular territory, whether the service would pay, whether the proposed operation would weaken the road with which the carrier proposing it would come into competition, whether the cost of the trackage rights would be too burdensome, whether such operations would be likely to impair the ability of the carriers involved to perform their common carrier functions and to maintain themselves as a part of the general transportation system of the country, are all factors to be considered in determining whether public convenience and necessity warrant such operation.

The decisions of the Interstate Commerce Commission first denied and later merely doubted its jurisdiction over [fol. 108] such trackage agreements, but for some ten years the decisions have been the other way. In Cleveland, C. C.

& St. L. Ry. Co. v. Commerce Commission, 146 N. E. (Ill.) 606, the Supreme Court of Illinois treated a trackage agreement as an "extension" under Section 1(18) In Cleveland etc. Ry. v. United States, 275 U. S. at p. 409, the Supreme Court sustained the jurisdiction of the Interstate Commerce Commission under another section of the Act stating that "the order gave no trackage rights" and impliedly agreeing with the Illinois Court on the law but differing as to the facts and the section applicable to the case. In I. C. C. v. Los Angeles, 280 U. S. 52, the Supreme Court seems to have approved an order of the Interstate Commerce Commission for the joint use of terminal facilities. Justice Brandeis, moreover, remarked in Alabama Ry. v. Jackson Ry., 271 U. S. at p. 249, that:

"The only limitation set by Transportation Act, 1920, upon the broad powers conferred upon the Commission over the construction, extension and abandonment of the lines of carriers in interstate commerce, is that introduced as paragraph 22 of §1, which excludes from its jurisdiction 'spur, industrial, team, switching or side tracks, located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.'"

There is also the other ground of jurisdiction of the Interstate Commerce Commission that the trackage agreement expired several years ago and the service so far as the parties are concerned may at any time be abandoned. Section 1(18) expressly gives jurisdiction to the Interstate Commerce Commission to prevent abandonment and requires a certificate that "public convenience and necessity permit" abandonment before it can take place. If the Commission has jurisdiction to prevent abandonment in such a [fol. 109] case as this, it has the inevitable power to compel continuance and, as incidental to that power, to determine what sort of an agreement is compatible with the interests of interstate commerce.

The contention of the Transit Commission that the order of the Interstate Commerce Commission is invalid because it affects an existing relation between the railroads is without substance. The Long Island is a mere tenant at will, whose right to use the Pensylvania terminal facilities has

expired. The argument would apparently preclude jurisdiction perpetually, wherever a carrier having a lease in 1920 holds over with the acquiescence of its lessor. Such a result has no rational basis.

The contention that the certificate of convenience and necessity ought not to have been made upon the conditions imposed cannot prevail. Section 20 (1) expressly empowers the Commission to attach conditions to a certificate. Atlantic Coast Line R. Co. v. United States, 284 U. S. at p. 295.

In our opinion the Interstate Commerce Commission has jurisdiction over the trackage agreement under Section 1 (18), and Section 148 of the Railroad Law of the State of New York does not govern this case.

Jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island Railroad, when running its trains under the proposed trackage agreement, (1) would be operating a "line of railroad" within the meaning of Section 1 (18); (2) would be undertaking the "extension of its line" and engaging "in transportation * * * by means of such extended line"; and (3) would be preventing an abandonment, which might occur, [fol. 110] if the railroads agreed to discontinue joint use of terminal facilities because of burdensome rulings of the State authorities.

The motions for a preliminary injunction are denied and the petitions are each dismissed with costs.

Findings may be proposed in accordance with this opinion within ten days, which, however, are intended solely for the aid of the court in making its findings and shall be no part of the record.

Augustus N. Hand, C. J. Robert P. Patterson, D. J.
Wm. Bondy, D. J.

[fol. 111] In United States District Court

In Equity. No. E 66-258. In Equity. No. E 66-367

[Titles omitted]

Findings of Fact and Conclusions of Law—Filed Oct. 14, 1932

The above entitled actions to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commis-

sion, dated February 8, 1932, having duly come on to be heard on the equity side of this court before a special court of three judges, constituted and convened pursuant to the Act of Congress, approved October 22, 1913, 28 U. S. C. A., Section 47, and composed of Hon. Augustus N. Hand, Circuit Judge, and of Hon. William Bondy and Hon. Robert P. Patterson, District Judges; and the said causes having been consolidated and the trial and arguments having been held; and the consolidated cause having been considered [fol. 112] on the petitions, answers and the evidence submitted; and due consideration having been had; and the court having filed its opinion thereon October 3, 1932, the following findings of fact and conclusions of law are hereby made:

Findings of Fact

1. Ever since the completion of the Pennsylvania Station in 1910, the Long Island Railroad Company has been operating its trains into it, under a trackage agreement. The Pennsylvania Station and yard, located in midtown Manhattan, is the Eastern Terminal of the Pennsylvania system. In addition to this station building and yard, the terminal property consists of two single track tunnels which run in a westerly direction under the city and the Hudson River into New Jersey and four single track tunnels which run in an easterly direction under the city and the East River and of the Sunnyside Yard in Queens.

2. The legal ownership of this terminal property is in the Pennsylvania Tunnel and Terminal Railroad Company; but the Pennsylvania Railroad Company owns all the stock in the Terminal Company, as well as practically all the stock of the Long Island Railroad Company.

3. Upon the completion of the Pennsylvania Station in 1910, the Long Island began to operate over the tracks of the Pennsylvania into the latter's station under a trackage agreement, for which the carriers sought and obtained the necessary permission and approval of the Public Service Commission for the First District of the State of New York, thus extending its operation from Long Island into midtown Manhattan. This agreement (with like approval) was modified by another dated June 24, 1912, and the rental payable by the Long Island was, in 1920, and again, in 1922,

increased with the approval of the Public Service Commission and (after 1921) of its successor, the Transit Commission. Under these various changes approved by the State authorities, the rental payable by the Long Island increased from $519,173 in 1911 to $1,660,165 in 1922 and to $1,812,024 in 1923.

4. In 1923, the carriers made application to the Transit Commission for the approval of an amendment to the then existing trackage agreement, which involved a further in- [fol. 113] crease of the rental payable by the Long Island. The Long Island contemporaneously sought to increase its intrastate commutation fares for passengers.

5. Under the terms of the existing agreement, the Long Island was paying to the Pennsylvania, as rental, a share of the operating expenses and taxes (less net revenue from station privileges) on the jointly used facilities east of Tenth Avenue, Manhattan, including the station building, and, in addition, a fixed sum of $300,000 per annum. The amendment proposed in 1923 required that the Long Island share, on a wheelage basis, in the interest at 4 per cent on the investment in the jointly used facilities and in the station building, instead of paying the lump sum of $300,000 as before. Under this proposed agreement, the Long Island would share in the interest (as well as in the operating expenses and taxes) on a wheelage basis; that is, according to the percentage which the cars operated by it in each of the three zones, into which the joint facilities were divided, bore to the total number of cars operated therein by the Pennsylvania, the Long Island, and the three other carriers to which the Pennsylvania had granted trackage rights. This change would have increased the Long Island rental by over $1,000,000. This amendment was disapproved by the Transit Commission.

6. For the purpose of counting cars, there are three zones; the first, consisting of the Pennsylvania Station and the station yards between Sixth and Tenth Avenues, Manhattan; the second, consisting of the tracks, extends east from Sixth Avenue through the East River tunnels and to Harold Avenue in Queens; the third, consisting of the Sunnyside Yards, lies to the north and a little to the east of the most eastward portion of the second zone.

7. Most of the Pennsylvania trains which carry "commuters" stop in New Jersey where the passengers are transferred to the tubes of the Hudson Terminal, whereby they come into the city. The Pennsylvania trains from a long distance come through the Hudson River tunnels to the station in Manhattan, there unload and thence continue through the East River tunnels to the Sunnyside Yards, where they are stored, cleaned and repaired and again made up into trains which return under the East River to the station in order to load and proceed westward.

[fol. 114] 8. The Long Island trains come from the east over the Pennsylvania tracks, under the East River into the Pennsylvania Station, load again and start back east. Since a majority of the passengers are "commuters", a number of these trains remain in the Pennsylvania Station during the middle of the day and at the eastern Long Island terminals during the night.

9. The Sunnyside Yards are used for storage principally by the Pennsylvania, while the Manhattan Yards are used principally by the Long Island. As the station yards will not hold all the Long Island cars, some are returned to points on Long Island, though the percentage thus returned is small. A few trains are stored at Jamaica. The total number car movements for 1928 in the three zones was as follows:

	Long Island	Pennsylvania
Zone 1	41.44%	58.56%
Zone 2	59.94%	40.06%
Zone 3	11.60%	88.40%

10. The wheelage ratios, representing the proportion which the Long Island was required to pay in 1930 on the investment in each of the three zones were as follows:

Zone 1	$46,896,746.94	42.08%
Zone 2	32,603,521.38	60.49%
Zone 3	8,623,170.90	7.65%

11. In March, 1925, another application to the Transit Commission was made for approval of a trackage agreement similar to the one rejected, except that this application eliminated from the investment base the sum of $15,000,000, representing the cost of the station building

above the track level, and increased the share in the interest from 4 to 5 per cent. This proposed agreement was disapproved by the Transit Commission in May, 1925; but on July 28, 1925, was approved upon a reduction of the interest rate by the carriers to 4 per cent. In November, 1925, a further application was made to the Transit Commission to approve an increase of the interest rate to 6 per cent. This was disallowed in December, 1925, but an extension of the agreement as approved July 28, 1925, was granted for one year from January 1, 1926.

[fol. 115] 12. In 1929, the carriers applied to the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 1 (18) of the Interstate Commerce Act, authorizing the Long Island to continue operation at the rental rejected by the Transit Commission in December, 1925, and also for an order under Section 3 (4) of that Act, requiring the use of the joint facilities at this rental and upon terms which had been embodied in an agreement dated November 13, 1928. The Interstate Commerce Commission held that Section 3 (4) was not applicable to a case where one carrier agreed to the use of its facilities by another. It likewise held that it had jurisdiction under Section 1 (18), but denied the application without prejudice on the ground that it imposed unreasonable terms upon the Long Island.

13. On December 27, 1930, the carriers made another application to the Interstate Commerce Commission under Section 1 (18). This application eliminated from the investment base $15,000,000 representing the station building above the track level, required the Long Island to pay 20 per cent. of the operating expenses of that building, and reduced the rate of interest from 6 to 5¾ per cent. On February 8, 1932, the Interstate Commerce Commission granted a certificate of public convenience and necessity, upon condition that the rental upon additions and betterments, made to the Pennsylvania Station after July 1, 1928, should be excluded from the rate base, that the terms of the agreement should be five years instead of twenty years, as applied for, and that the rate of interest on the investment cost of jointly used facilities should be 5 per cent.

14. The companies filed with the Interstate Commerce Commission their acceptance of the order of certificate,

dated March 2, 1932, and a copy of a new trackage agreement, dated March 10, 1932.

15. The rental payable by the Long Island under the trackage agreement approved by the Transit Commission increased from $1,812,024 in 1923 to $2,835,151 in 1928.

16. It is conceded that public convenience and necessity require the continuance of the use by the Long Island of the Pennsylvania facilities and the Interstate Commerce Commission so found; and there is no claim that the findings of facts by the Interstate Commerce Commission were unsupported by evidence.

[fol. 116] 17. Operation, whether over newly constructed lines or under trackage agreements over existing lines of another carrier, may substantially affect interstate commerce by affecting the ability of the carriers involved to perform their service as a part of the general transportation system of the country, by unnecessarily duplicating lines or by causing undesirable expense or other undue burdens.

18. An extension, whether arising out of a trackage agreement for joint use of the lines of another railroad or otherwise, has a vital effect on interstate commerce and requires national control. The same dangers that are to be guarded against when a railroad extends its line for its own use, or leases it for the sole use of another, exist where it agrees to a joint use by itself and another road.

19. The trackage agreement approved by the Transit Commission expired several years ago. From that time and until the new trackage agreement dated March 10, 1932, which was approved by the Interstate Commerce Commission, the Long Island was a mere tenant at will, whose right to use the Pennsylvania terminal had expired.

20. During the period of the tenancy at will, the carriers continued to operate under the conditions approved by the Transit Commission on July 28, 1925, and formally extended to January 1, 1927.

Conclusions of Law.

1. The right of the Interstate Commerce Commission to issue its certificate of February 8, 1932, depends upon the proper interpretation of Section 1 (18) of the Interstate Commerce Act.

2. The general purpose of the amendment to the Interstate Commerce Act, under which Section 1 (18) was adopted, was to control railroads, whose operations affected interstate commerce, in such a way as to avoid excessive expenditures by the building of unnecessary lines and to prevent injurious competition and the abandonment of useful arteries of commerce.

3. It is the settled governmental policy to control interstate transportation by a single body charged with the duty of supervising it as a whole; and, in view of this, it seems [fol. 117] reasonable to construe the words "operate any line of railroad", found in Subdivision 18 of Section 1, as embracing any railroad having interstate relations, that runs its trains over the lines of another, under a trackage agreement entered into between the two roads. The above words are alone sufficient to bring the present case within the jurisdiction of the Interstate Commerce Commission.

4. The words "no carrier * * * shall undertake the extension of its line of railroad * * * or shall engage in transportation * * * by means of such * * * extended line" fairly cover the proposed contract. It is unreasonable to confine them to cases of the construction, acquisition or maintenance of an extension by an owner.

5. Whether there was need of the additional service in the particular territory, whether the service would pay, whether the proposed operation would weaken the road with which the carrier proposing it would come into competition, whether the cost of the trackage rights would be too burdensome, whether such operations would be likely to impair the ability of the carriers involved to perform their common carrier functions and to maintain themselves as a part of the general transportation system of the country, are all factors to be considered in determining whether public convenience and necessity warrant such operation.

6. Section 1 (18) expressly gives jurisdiction to the Interstate Commerce Commission to prevent abandonment and requires a certificate that "public convenience and necessity permit" abandonment before it can take place. If the Commission has jurisdiction to prevent abandonment in such a case as this, it has the inevitable power to compel continuance and, as incidental to that power, to determine what sort of an agreement is compatible with the interests of interstate commerce.

7. The contention of the Transit Commission that the order of the Interstate Commerce Commission is invalid because it affects an existing relation is without foundation.

8. The contention that the certificate of convenience and necessity ought not to have been made upon the conditions imposed cannot prevail.

9. The Interstate Commerce Commission has jurisdiction over the trackage agreement under Section 1 (18), and Section 148 of the Railroad Law of the State of New [fol. 118] York no longer governs this case.

10. Jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island Railroad, when running its trains under the proposed trackage agreement, (1) would be operating a "line of railroad" within the meaning of Section 1 (18); (2) would be undertaking the "extension of its line" and engaging "in transportation * * * by means of such extended line"; and (3) would be preventing an abandonment, which might occur, if the railroads agreed to discontinue joint use of terminal facilities because of burdensome rulings of the State authorities.

11. The motions for a preliminary injunction should be denied and the petitions each dismissed with costs.

Dated New York, October 13, 1932.

Augustus N. Hand, U. S. C. J. William Bondy, U. S. D. J. Robert P. Patterson, U. S. D. J.

(Submitted by the Transit Commission and by the State of New York October 7th, 1932, pursuant to the opinion of the Court filed October 3, 1932.)

[fol. 119] In United States District Court, Southern District of New York

1. E. 66258

Transit Commission, Petitioner,

against

The United States of America, The Long Island Railroad Company, and The Pennsylvania Railroad Company, Respondents, and Interstate Commerce Commission, Intervening Respondent

2. E. 66367

The State of New York, Petitioner,

against

Same

Order Denying Motions for Preliminary Injunction and Decree Dismissing the Bills—Filed Oct. 20, 1932

Applications for preliminary injunctions having been made in these cases and this court having been duly convened pursuant to Section 47, Title 28 of the U. S. C. and the parties in open court before such applications were heard having stipulated that the cases be consolidated and that all the proofs be offered and that the case so consolidated should be submitted and considered also as for final hearing and disposition and having been so submitted on June 29th, 1932, and the court having duly considered the same and being fully advised in the premises now announces its conclusion thereon: The applications for preliminary injunctions are denied. Since all the proof has been offered and received which the petitioners intend to [fol. 120] offer on the issues framed by the pleadings we will consider this as a final hearing and dismiss the bills.

It is therefore ordered, adjudged and decreed as follows: That the applications for a preliminary injunction be and

are denied and that the bills are dismissed with costs to the defendants.

Dated New York, N. Y., October 19th, 1932.

(Signed) Augustus N. Hand, Circuit Judge. (Signed) Wm. Bondy, District Judge. (Signed) Robert P. Patterson, District Judge.

[fol. 121] In United States District Court

In Equity. No. 66258. In Equity. No. 66367

[Title omitted]

Assignment of Errors—Filed Nov. 9, 1932

Now comes the Transit Commission and the State of New York, petitioners in the above entitled causes, by their respective counsel and file the following assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States from the final decree or order of the District Court entered in this cause on the 20th day of October, 1932.

The District Court erred:

[fol. 122] 1. In failing to enjoin, set aside, annul or suspend the order and certificate of the Interstate Commerce Commission, dated February 8, 1932.

2. In dismissing the petitions of the petitioners and denying their applications for an injunction.

3. In holding that the issuance of said order and certificate was within the authority conferred upon the Interstate Commerce Commission by Section 1 (18) of the Interstate Commerce Act.

4. In holding that Section 1 (18) of the Interstate Commerce Act has application to operation conducted under trackage rights by one carrier over the existing tracks of another interstate carrier.

5. In holding that jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Is-

land Railroad Company, when running its trains under the proposed trackage agreement, would be operating "a line of railroad" within the meaning of Section 1 (18) of the Interstate Commerce Act.

6. In holding that jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island Railroad Company, when running its trains under the proposed trackage agreement, would be undertaking the "extension of its line" and engaging "in transportation * * * by means of such extended line".

7. In holding that Section 1 (18) of the Interstate Commerce Act applies to operation begun prior to its enactment.

8. In holding that the Interstate Commerce Commission has jurisdiction over the trackage agreement, under Section 1 (18) of the Interstate Commerce Act.

9. In holding that, under Section 1 (18) of the Interstate Commerce Act, the Interstate Commerce Commission has jurisdiction to prevent the abandonment of trackage rights, the power to compel continuance thereof, and, as incidental thereto, the power to determine what sort of an agreement is compatible with the interests of interstate commerce.

10. In holding that Section 148 of the Railroad Law of the State of New York no longer governs this case.

[fol. 123] 11. In finding as a fact that operation under trackage agreements over existing lines of another carrier may substantially affect interstate commerce, by affecting the ability of the carriers involved to perform their service as a part of the general transportation system of the country, by unnecessarily duplicating lines or by causing undesirable expense or other burdens.

12. In finding as a fact that an extension arising out of a trackage agreement has a vital effect on interstate commerce and requires national control, and that the same dangers that are to be guarded against when a railroad extends its line for its own use or leases it for the sole use of another exists where it agrees to a joint use by itself and another road.

Wherefore the above named petitioners herein and each of them pray that the said order or decree of the said

court denying them the relief prayed for and dismissing the petitions be reversed and set aside, with directions that the permanent injunction applied for be granted and for such other and further relief as may be appropriate.

Dated New York, November 7th, 1932.

George H. Stover, Counsel for the Transit Commission. John J. Bennett, Jr., Attorney General of the State of New York.

[fol. 124] IN UNITED STATES DISTRICT COURT

In Equity. No. 66258. In Equity. No. 66367

[Titles omitted]

PETITION FOR APPEAL—Filed Nov. 9, 1932

To a judge of said court:

The Transit Commission and the State of New York petitioners, feeling themselves aggrieved by the final order or decree of the District Court of the United States for the Southern District of New York, entered in this court on the 20th day of October, 1932, denying an injunction against the certificate or order of the Interstate Commerce Commission here involved, and dismissing the bills of petitioners, pray and appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors which accompanies this petition and to which reference is made.

[fol. 125] Wherefore said petitioners pray that an appeal be allowed with proper security for cost to be fixed and taken with the requisite citation to be signed and issued as provided by law, and that a transcript of the record, proceedings and papers on which the order or decree was made and entered duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated New York, November 7, 1932.

George H. Stover, George H. Stover, Counsel to the Transit Commission. John J. Bennett, Jr., John J. Bennett, Jr., Attorney General of the State of New York.

[fol. 126] In United States District Court

In Equity. No. 66258. In Equity. No. 66367

[Titles omitted]

Order Allowing Appeal—Filed Nov. 9, 1932

In the above entitled cause, the Transit Commission and the State of New York, petitioners, having made and filed their petitions praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court of the United States for the Southern District of New York in this cause, entered October 20, 1932, and having also made and filed an assignment of errors and having in all respects conformed to the statutes and rules of the court in such case made and provided, it is [fols. 127-128½] Ordered and decreed that the appeal be and the same hereby is allowed as prayed for upon the filing of a bond in the sum of $250.00 as required by law.

Augustus N. Hand, C. J. William Bondy, Robert P. Patterson, United States District Judges.

Dated New York, November 7th, 1932.

[fol. 129] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 130] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Part- of the Record to be Printed—Filed Dec. 2, 1932

Come now the appellants and adopt the assignments of error as their statement of the points to be relied upon and represent that the following parts of the record are necessary for consideration in the case:

Record page

1 1. Petition of Transit Commission, filed March 31, 1932 (E66-258).

14 2. Intervention of Interstate Commerce Commission, filed April 22, 1932 (E66-258).

[fol. 131]

Record page

15 3. Answer of Interstate Commerce Commission, filed April 22, 1932 (E66-258).

51 4. Answer of Pennsylvania Railroad Company and The Long Island Railroad Company, filed April 29, 1932 (E66-258).

59 5. Answer of United States of America, filed May 3, 1932 (E66-258).

61 6. Petition of State of New York, filed April 15, 1932 (E66-367), omitting all after paragraph one with notation that balance is identical with petition of Transit Commission.

76 7. Intervention of Interstate Commerce Commission, filed April 22, 1932 (E66-367).

77 8. Answer of Interstate Commerce Commission, filed April 22, 1932 (E66-367) omitting Exhibits A and B with notation that they are same as those in answer to Transit Commission suit.

83 9. Answer of Pennsylvania Railroad Company and The Long Island Railroad Company, filed April 29, 1932 (E66-367).

90 10. Answer of United States, filed May 5, 1932 (E66-367).

93-95 11. Order to Show Cause why interlocutory injunction should not issue, filed June 8, 1932 (both cases).

97-1 to 97-93a incl. 12. Minutes of hearing before Statutory Court held on June 29, 1932 (both cases), omitting all after first paragraph of page 9 consisting of argument of Counsel.

98 13. Petitioners Exhibit 1—hearing on June 29, 1932 (both cases) as follows:

98a a. Application filed December 13, 1928 omitting Exhibits A, B, C, D and E.

98c b. Order of the Commission entered February 12, 1929, permitting Transit Commission to intervene.

98d c. Amendment to application filed May 21, 1929.

Record page

98e d. Transcript of stenographer's notes of the hearing held July 2nd and 3rd, 1929, at New York, N. Y. before Examiner Thomas F. Sullivan and Exhibits omitted except Exhibits 6, 7, 8, 15, 16.

98f e. Transcript of stenographer's notes of the hearing held July 18th and 19, 1929, at New York, N. Y., before Examiners Thomas F. Sullivan and W. P. Bartell and Exhibits omitted (except Exhibit 18).

[fol. 132]

98g f. Report proposed by Examiner Jameson served on October 14, 1929.

98h g. Report and order of the Commission filed and entered March 18, 1930.

98i h. Petition submitting modified contract and asking that a certificate of public convenience and necessity be issued; filed December 27, 1930.

98j i. Order of the Commission entered January 10, 1931.

98k j. Transcript of the stenographer's notes of the hearing held March 23rd and 24th, 1931 at New York, N. Y., Before Examiner Thomas F. Sullivan and all exhibits omitted.

98l k. Report proposed by Examiner Jameson, served June 30, 1931.

98m l. Report, certificate and order of the Commission, filed and entered February 8, 1932.

98n m. Petition of the Transit Commission of the State of New York, filed February 27, 1932.

98p n. Agreement between the Pennsylvania Railroad Company and The Long Island Railroad Company, filed March 12, 1932.

98q o. Order of the Commission entered March 14, 1932.

98r p. Notice of acceptance by the Pennsylvania Railroad Company and The Long Island Railroad Company of the condition set

Record page

forth in the certificate and order made February 8, 1932; received March 3, 1932.

99 14. Opinion of Statutory Court filed October 3, 1932.

110 15. Findings of Fact and Conclusions of Law entered October 13, 1932.

119 16. Final decree dismissing petitions, entered October 20, 1932.

17. Petition for leave to appeal.

18. Order allowing appeal.

19. Assignment of errors.

Dated New York, December 2, 1932.

George H. Stover, Solicitor for the Appellant Transit Commission. John J. Bennett, Jr., Solicitor for the Appellant State of New York.

[fol. 132½] Service of the within Statement of Points to be Relied upon and Designation of the Part of the Record to be Printed is hereby admitted.

Dated December 2, 1932.

Thomas D. Thacher, Solicitor for the United States of America. H. L. Underwood, Solicitor for Interstate Commerce Commission. Joseph F. Keany, Solicitor for the Long Island Railroad Co. Alfred A. Gardner, Solicitor for Pennsylvania Railroad Company.

[fol. 133] In Supreme Court of the United States

Stipulation re Transcript of Record—Filed Dec. 2, 1932

It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto that the following parts of petitioner's Exhibit No. 1 are true and correct copies ordered to be incorporated into the transcript of record on appeal from the final decree entered in the office of the Clerk of this Court on October 20, 1932.

[fol. 134] Petitioner's Exhibit 1, hearing on June 29, 1932 (both cases) as follows:

a. Application filed December 13, 1928.

b. Return to questionnaire, filed January 28, 1929.

c. Intervening petition of the Transit Commission of the State of New York filed, and order of the Commission entered February 12, 1929, permitting same.

d. Amendment to application filed May 21, 1929.

e. Transcript of stenographer's notes of the hearing held July 2nd and 3rd, 1929, at New York, N. Y., before Examiner Thomas F. Sullivan (omitting all exhibits filed at said hearing except Exhibits 6, 7, 8, 15, 16).

f. Transcript of stenographer's notes of the hearing held July 18th and 19th, 1929 at New York, N. Y., before Examiners Thomas F. Sullivan and W. P. Bartell (omitting all exhibits filed at said hearing except Exhibit 18).

g. Report proposed by Examiner Jameson served on October 14, 1929.

h. Report and order of the Commission filed and entered March 18, 1930.

i. Petition submitting modified contract and asking that a certificate of public convenience and necessity be issued; filed December 27, 1930.

j. Order of the Commission entered January 10, 1931.

k. Transcript of the Stenographer's notes of the hearing held March 23rd and 24th, 1931 at New York, N. Y., before Examiner Thomas F. Sullivan (omitting all exhibits filed on said hearing).

l. Report proposed by Examiner Jameson, served June 30, 1931.

m. Report, certificate and order of the Commission, filed and entered February 8, 1932.

n. Petition of the Transit Commission of the State of New York, filed February 27, 1932.

[fols. 135 & 136] o. Brief on behalf of the Pennsylvania Railroad Company and Long Island Railroad Company in opposition to the request of the Transit Commission for reargument and rehearing; filed March 3, 1932.

p. Agreement between the Pennsylvania Railroad Company and The Long Island Railroad Company, filed March 12, 1932.

q. Order of the Commission entered March 14, 1932.

r. Notice of acceptance by the Pennsylvania Railroad Company and The Long Island Railroad Company of the

condition set forth in the certificate and order made February 8, 1932; received March 3, 1932.

Dated New York, November 25, 1932.

George H. Stover, Solicitor for Transit Commission. John J. Bennett, Jr., Solicitor for State of New York. Elmer B. Collins, Solicitor for United States of America. H. L. Underwood, Solicitor for Interstate Commerce Commission. Joseph F. Keany, by Alfred A. Gardner, Solicitor for Long Island Railroad Company. Alfred A. Gardner, Solicitor for Pennsylvania Railroad Company.

[fol. 137] [File endorsement omitted.]

Endorsed on cover: File No. 37,232. S. New York D. C. U. S. Term No. 535. Transit Commission and the State of New York, appellants, vs. The United States of America, The Long Island Railroad Company, The Pennsylvania Railroad Company, and the Interstate Commerce Commission. Filed December 2, 1932. File No. 37,232.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 535

TRANSIT COMMISSION AND STATE OF NEW YORK, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellants, in support of the jurisdiction of the Supreme Court to review the above entitled cause on appeal, respectfully represent:

A.

Statutory Provisions Sustaining Jurisdiction.

Sections 41, 41-(27), 41-(28), 44, 47 and 47*a*, Title 28 of the United States Code, being the Act of Congress approved June 30, 1926, provide as follows:

> "SEC. 41. *Original Jurisdiction.*—The district courts shall have original jurisdiction as follows:
>
> "SEC. 41, Subd. (27). *Enforcement of Orders of Interstate Commerce Commission.*—Twenty-seventh. Of all cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, ch. 231, Sec. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)
>
> "SEC. 41, Subd. (28). *Setting Aside Order of Interstate Commerce Commission.*—Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)"
>
> "SEC. 44. *Procedure in Certain Cases.*—The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49, shall be as provided in section 45 of this title.

The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)"

"SEC. 47. *Interlocutory Injunctions as to Orders of Interstate Commerce Commission; Appeal to Supreme Court.*—No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part,

of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

"SEC. 47*a*. (*Judicial Code, Section* 210.) *Appeal to Supreme Court from Final Decree; Time for Taking; Priority.*—A final judgment or decree of the district court in the cases specified in section 44 of this title may be re-

viewed by the Supreme Court of the United States if appeal to the Supreme Court taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, Sec. 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)"

B.

The Statute Involved is Section 1, Paragraph 18, of the Interstate Commerce Act (U. S. C. A. 49, page 121).

"SEC. 1, *Par.* (18). *Extensions or Abandonment of Lines; Certificate Required.*—No carrier by railroad subject to this chapter shall

undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

C.

Date of Decree and Date Upon Which Application for Appeal Was Presented.

The decree sought to be reviewed was entered on the 20th day of October, 1932, and the application for the appeal was submitted on the 7th day of November, 1932.

D.

Nature of Case and Rulings Below; This is a Consolidated Case.

On March 21, 1932, the Transit Commission instituted a suit against the United States of America,

The Long Island Railroad Company and The Pennsylvania Railroad Company by filing a petition in the United States District Court for the Southern District of New York, pursuant to Sections 41-(27), 41-(28) and 44 of Title 28 of the United States Code.

The petition prayed that the District Court enjoin, set aside and annul an order of the Interstate Commerce Commission issued February 8, 1932, which certified that the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company under trackage rights over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company between Harold Avenue and Sunnyside Yard and the Pennsylvania Station, New York, New York, upon the express condition that the terms and conditions be modified in the respects and to the extent indicated in said certificate.

On April 15, 1932, the State of New York filed an identical petition against the same parties seeking the same relief.

Respondents in both suits filed answers.

The Interstate Commerce Commission was permitted to intervene in both suits and filed answers thereto.

On June 8, 1932, upon the application of the Transit Commission and the State of New York an order to show cause was made pursuant to Section 47 of Title 28 of the United States Code, convening a special court of three judges of whom one was a circuit court judge, returnable June 28, 1932, requiring the respondents to show cause before that court so constituted and convened why the order of the Interstate Commerce Commission should not be temporarily enjoined.

At the request of the court and consent of the parties, the hearing set down for June 28, 1932, was adjourned to June 29, 1932.

At the hearing held on June 29, 1932, the two suits were consolidated and all parties consented to the hearing being considered as and for a final hearing and rested on the record before the Interstate Commerce Commission. On October 3, 1932, the court handed down an opinion holding that the application for the interlocutory and final injunctions should be denied and the petitions dismissed.

On the 20th day of October, 1932, a decree was made and entered denying the applications for interlocutory injunctions and finally dismissing petitions. An appeal from said decree was applied for on the 7th day of November, 1932.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1.

New England Divisions Case, 261 U. S. 184.

Manufacturers H. & R. Co. v. *United States*, 246 U. S. 257.

Texas v. *Eastern Texas R. R. Co.*, 258 U. S. 204.

Colorado v. *United States*, 271 U. S. 153.

Transit Commission v. *United States*, 284 U. S. 360.

We respectfully submit that the Supreme Court has jurisdiction of this appeal by virtue of Sections 41, 41-(27), 41-(28), 44, 47 and 47(*a*), Title 28 of the United States Code.

GEORGE H. STOVER,
Solicitor for Appellant Transit Commission.
JOHN J. BENNETT, JR.,
Solicitor for Appellant State of New York.

Filed November 9, 1932.

FILED OCT

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1

Docket Entry Sheet

Appellant,

vs.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and the INTERSTATE COMMERCE COMMISSION,

Appellees.

THE STATE OF NEW YORK,

Appellant,

vs.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and the INTERSTATE COMMERCE COMMISSION,

Appellees.

Motion for Admission of Additional Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

TRANSIT COMMISSION,
Appellant,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and the INTERSTATE COMMERCE COMMISSION,
Appellees.

THE STATE OF NEW YORK,
Appellant,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and the INTERSTATE COMMERCE COMMISSION,
Appellees.

No. 535

BRIEF ON BEHALF OF APPELLANTS.

This is an appeal from a decree of the United States District Court for the Southern District of New York, made in a consolidated cause, which denied motions for a preliminary injunction and dismissed with costs petitions to enjoin and set aside a certificate (R. 547) of the Interstate Com-

merce Commission, which certified that the present and future public convenience and necessity required the continued operation by The Long Island Railroad Company, over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company, between Harold Avenue in Sunnyside Yard and the Pennsylvania Station, New York, N. Y., upon the express condition that the existing terms and conditions as to rental be modified in the respects and to the extent indicated in said certificate.

The suits were brought under the Act of Congress approved October 22, 1913 (28 U. S. Code, Secs. 41(28) and 43-48).

The decree of the District Court was signed October 19, 1932, and entered October 20, 1932 (R. 580-581).

Petition for appeal was presented on November 7, 1932, and was allowed on the same day (R. 583).

Jurisdiction of this Court rests on the Act of Congress, October 22, 1913, Chap. 32, 38 Stat. 208, 220 (28 U. S. Code, Sec. 47), as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 938 (28 U. S. Code, Sec. 345).

The only issue raised in this case is one of law, namely, whether the Interstate Commerce Commission had authority to issue this certificate.

Specifically, the questions of law presented are:

1. Whether Section 1(18) of the Interstate Commerce Act applies to operation under trackage rights at all;

2. If so, whether it is retroactive and applies to such operation begun prior to the enactment; and

3. If so, whether the Commission can pass upon and dictate the terms and conditions of the agreement, to the exclusion of the State authorities.

Statement.

Ever since the completion of the Pennsylvania Station in 1910, the Long Island Railroad Company has been operating its trains into it, under a trackage agreement. The Pennsylvania Station and yard, located in midtown Manhattan, is the eastern terminal of the Pennsylvania system. In addition to this station building and yard, the terminal property consists of two single track tunnels which run in a westerly direction under the city and the Hudson River into New Jersey, and four single track tunnels which run in an easterly direction under the city and the East River, and of the Sunnyside Yard in Queens (Finding of Fact 1, R. 573).

The legal ownership of this terminal property is in the Pennsylvania Tunnel and Terminal Railroad Company; but the Pennsylvania Railroad Company owns all the stock in the Terminal Company, as well as practically all the stock of the Long Island Railroad Company (Finding of Fact 2, R. 573).

Upon the completion of the Pennsylvania Station in 1910, the Long Island began to operate over the tracks of the Pennsylvania into the latter's station under a trackage agreement, for which the carriers sought and obtained the necessary permission and approval of the Public Service Commission for the First District of the State of New York, thus extending its operation from Long Island into midtown Manhattan. This agreement, with like approval, was modified by another dated June 24, 1912; and the rental payable by the Long Island was, in 1920, and again in 1922, increased with the approval of the Public Service Commission and (after 1921) of its successor, the Transit Commission. Under these various changes approved by the State authorities, the rental payable by the Long Island increased from $519,173 in 1911, to $1,660,165 in 1922, and to $1,812,024 in 1923 (Finding of Fact 3, R. 573-574).

In 1923 the carriers made application to the Transit Commission for the approval of an amendment to the then existing trackage agreement, which involved a further increase

of the rental payable by the Long Island. The Long Island contemporaneously sought to increase its intrastate commutation fares for passengers (Finding of Fact 4, R. 574).

Under the terms of the existing agreement, the Long Island was paying to the Pennsylvania, as rental, a share of the operating expenses and taxes (less net revenue from station privileges) on the jointly used facilities east of Tenth Avenue, Manhattan, including the station building, and, in addition, a fixed sum of $300,000 per annum. The amendment proposed in 1923 required that the Long Island share, on a wheelage basis, in the interest at 4 per cent. on the investment in the jointly used facilities and in the station building, instead of paying the lump sum of $300,000 as before. Under this proposed agreement, the Long Island would share in the interest (as well as in the operating expenses and taxes) on a wheelage basis—that is, according to the percentage which the cars operated by it in each of the three zones, into which the joint facilities were divided, bore to the total number of cars operated therein by the Pennsylvania, the Long Island, and the three other carriers to which the Pennsylvania had granted trackage rights. This change would have increased the Long Island rental by over $1,000,000. This amendment was disapproved by the Transit Commission (Finding of Fact 5, R. 574).

For the purpose of counting cars, there are three zones: the first consisting of the Pennsylvania Station and the station yards between Sixth and Tenth Avenues, Manhattan; the second, consisting of the tracks, extends east from Sixth Avenue through the East River tunnels and to Harold Avenue in Queens; the third, consisting of the Sunnyside Yards, lies to the north and a little to the east of the most eastward portion of the second zone (Finding of Fact 6, R. 574).

Most of the Pennsylvania trains which carry "commuters" stop in New Jersey, where the passengers are transferred to the tubes of the Hudson Terminal, whereby they come into the city. The Pennsylvania trains from a long distance come through the Hudson River tunnels to the station in Manhattan, there unload and thence continue through the East River tunnels to the Sunnyside Yards, where they are

stored, cleaned and repaired and again made up into trains which return under the East River to the station in order to load and proceed westward (Finding of Fact 7, R. 575).

The Long Island trains come from the east over the Pennsylvania tracks, under the East River into the Pennsylvania Station, load again and start back east. Since a majority of the passengers are "commuters," a number of these trains remain in the Pennsylvania Station during the middle of the day and at the eastern Long Island terminals during the night (Finding of Fact 8, R. 575).

The Sunnyside Yards are used for storage principally by the Pennsylvania, while the Manhattan yards are used principally by the Long Island. As the station yards will not hold all the Long Island cars, some are returned to points on Long Island, though the percentage thus returned is small. A few trains are stored at Jamaica. The relative percentages of car movements for 1928 in the three zones was as follows:

	Long Island	*Pennsylvania*
Zone 1.....	41.44%	58.56%
Zone 2.....	59.94%	40.06%
Zone 3.....	11.60%	88.40%

(Finding of Fact 9, R. 575).

The wheelage ratios, representing the proportion which the Long Island was required to pay in 1930 on the investment in each of the three zones was as follows:

Zone 1.....	42.08%	$46,896,745.94
Zone 2.....	60.49%	32,605,521.38
Zone 3.....	7.65%	8,625,170.90

(Finding of Fact 10, R. 575).

In March, 1925, another application to the Transit Commission was made for approval of a trackage agreement similar to the one rejected, except that this application eliminated from the investment base the sum of $15,000,000, representing the cost of the station building above the track level, and increased the share in the interest from 4 to 5 per cent.

This proposed agreement was disapproved by the Transit Commission in May, 1925, but on July 28, 1925, was approved upon a reduction of the interest rate by the carriers to 4 per cent. In November, 1925, a further application was made to the Transit Commission to approve an increase in the interest rate to 6 per cent. This was disallowed in December, 1925, but an extension of the agreement as approved July 28, 1925, was granted for one year from January 1, 1926 (Finding of Fact 11, R. 575-576).

The rental payable by the Long Island under the trackage agreement approved by the Transit Commission increased from $1,812,024 in 1923 to $2,835,151 in 1928 (Finding of Fact 15, R. 576).

In 1929, the carriers applied to the Interstate Commerce Commission for a certificate, under Section 1(18) of the Interstate Commerce Act, that public convenience and necessity required a continuance of operation, and for an order, under Section 3(4), requiring the use of joint facilities at the rental and upon the terms embodied in an agreement dated November 13, 1928. The Interstate Commerce Commission held that Section 3(4) was not applicable to a case where one carrier agreed to the use of its facilities by another. It held that it did have jurisdiction under Section 1(18), but denied the application without prejudice on the ground that it imposed unreasonable terms upon the Long Island (Finding of Fact 12, R. 576; Report of Division 4, R. 335).

In its report, *Long Island Railroad Company Trackage*, 162 I. C. C. 218, the Commission said (R. 336):

> "It is true that the joint agreement under which the Long Island has been using these facilities since July 1, 1923, is one which was framed to meet the requirements of the Transit Commission, as expressed and made retroactive by their approval of the contract of July 28, 1925, after extended hearings and investigation. Prior agreements were also approved by the Transit Commission or its predecessor. It is true that the amount of rental which the Long Island pays to its parent company is a matter that primarily con-

cerns intrastate passenger traffic, indeed hardly more than traffic within the suburban zone of the city, and that the public interest affected might appear to be entirely local. These facts do not, however, place the granting of authority covering these trackage rights beyond the purview of section 1(18). The existing agreement of the Pennsylvania and the Long Island was on a yearly basis. It technically expired on December 31, 1925, and was extended for one year. The desire now being to establish a more permanent arrangement, the proposed agreement is for a term of 20 years beginning July 1, 1928. The granting of authority for the applicants' proposal under section 1(18) is both necessary and appropriate, and there is no sound reason preventing the assumption of jurisdiction by us under this part of the act, even though joint operation began prior to the effective date of the transportation act, 1920, and has been continuous";

and (R. 337):

"The reasonableness of a joint-facility rental is in general a matter of public interest, as well as a matter which may affect the operations of the carriers in interstate commerce, and should be considered by us in reaching a finding of public convenience and necessity. Thus, the financial as well as the transportation features of the present application may be fully recognized and dealt with under the authority conferred by section 1(18). In cases of extensions of operations under trackage rights the cost of the applicant companies is not less important than in cases of extension by construction, acquisition, or lease. A motion to dismiss the application on the ground of lack of jurisdiction was properly denied";

and (R. 338):

"The power conferred upon us by the act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary. The case is brought to issue mainly because of the possibility of increased fares on the Long Island, but consideration of the questions of rental, degree of use, and the like which are now presented must be weighed entirely on the showing of fairness and reasonableness and should not be influenced by the contingency emphasized by

the protestants. The Pennsylvania and the Long Island are entitled to equally fair treatment in the matter. The terms of past agreements are not before us for approval."

Under this proposed agreement of November 13, 1928, the station building was reinstated in the investment. The items of operating and maintenance expenses previously withdrawn as pertaining to the station above the track level were also included. The interest rate was increased from 4 per cent. to 6 per cent. on the investment. Allowance was made for rentals received by the Pennsylvania from offices, stores and other concessions in the station. As under the then existing contract, the aggregate of interest, taxes and operating expenses in each zone was to be the base to which the wheelage measure in that zone applied. There would be no change in the direct operating charges. The agreement contained provision for revision at the end of five-year periods with respect to the rates of interest and the bases upon which they were to be computed (Report of Division 4, R. 344).

On December 27, 1930, the carriers made another application to the Interstate Commerce Commission under Section 1(18). This application eliminated from the investment base $15,000,000, representing the station building above the track level, required the Long Island to pay 20 per cent. of the operating expenses of that building, and reduced the rate of interest from 6 to 5¾ per cent. On February 8, 1932, the Interstate Commerce Commission granted a certificate of public convenience and necessity, upon condition that the rental upon additions and betterments, made to the Pennsylvania Station after July 1, 1928, should be excluded from the rate base, that the term of the agreement should be five years instead of twenty years, as applied for, and that the rate of interest on the investment cost of jointly used facilities should be 5 per cent. (Finding of Fact 13 (R. 576).

This 5 per cent. rate is higher than that paid by the Pennsylvania to its lessor, namely, 5 per cent. on $50,000,000 capital stock of the Tunnel Company and 4.5 per cent. on $58,600,577 principal amount of its bonds, or about 4.7 per cent. (R. 355).*

* *Acquisition by P. R. R.*, 154 I. C. C. 283.

On February 26, 1932, the Transit Commission made application to the Interstate Commerce Commission for a reargument or rehearing (R. 548-550); and on March 14, 1932, the Interstate Commerce Commission entered an order denying said application (R. 563).

The certificate or order of February 8, 1932, had provided in part (R. 547):

> "It is ordered, That, if within 60 days from the date hereof, The Long Island Railroad Company and The Pennsylvania Railroad Company shall jointly file with this commission written notice of the acceptance by them of the foregoing conditions, this certificate shall take effect and be in force from and after 30 days from the filing of said acceptance; and in such event the said carriers, within 30 days from the date of such acceptance, shall file with this commission duly verified copies of the joint operating agreement as modified in accordance with said conditions and executed."

The companies filed with the Interstate Commerce Commission their acceptance of the order or certificate, dated March 2, 1932, and a copy of a new trackage agreement, dated March 10, 1932 (Finding of Fact 14, R. 576).

On March 31, 1932, the Transit Commission instituted suit to enjoin, set aside and annul the order or certificate of the Interstate Commerce Commission (R. 1-10). An identical suit was instituted by the State of New York on April 15, 1932 (R. 53).

Answers to the petitions of the Transit Commission and of the State of New York were filed as follows: by the Interstate Commerce Commission on April 22, 1932 (R. 10, 54); by the Pennsylvania and the Long Island on April 29, 1932 (R. 47, 59), and by the United States on May 3rd and 5th, 1932 (R. 51, 63).

On June 8, 1932, orders were signed requiring the respondents to show cause on June 28, 1932, before a court composed of three judges, why an interlocutory injunction should

not issue, suspending and restraining the enforcement, operation and execution of, and setting aside the certificate of February 8, 1932 (R. 65, 66).

These orders came on for hearing on June 29, 1932. The cases were consolidated; and the record before the Interstate Commerce Commission was introduced in evidence (R. 67, 564).

On October 3, 1932, an opinion denying the motions for a preliminary injunction and dismissing the petitions with costs was handed down (R. 564).

Findings were filed October 14, 1932 (R. 572).

The final decree was entered October 20, 1932 (R. 580).

The order allowing appeal was signed November 7, 1932 (R. 584).

Specification of Assignment of Errors to Be Urged.

The District Court erred:

1. In failing to enjoin, set aside, annul or suspend the order and certificate of the Interstate Commerce Commission dated February 8, 1932.

2. In dismissing the petitions of the petitioners and denying their applications for an injunction.

3. In holding that the issuance of said order and certificate was within the authority conferred upon the Interstate Commerce Commission by Section 1(18) of the Interstate Commerce Act.

4. In holding that Section 1(18) of the Interstate Commerce Act has application to operation conducted under trackage rights by one carrier over the existing tracks of another interstate carrier.

5. In holding that jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island Railroad Company, when running its trains under the

proposed trackage agreement, would be operating "a line of railroad" within the meaning of Section 1(18) of the Interstate Commerce Act.

6. In holding that jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island Railroad Company, when running its trains under the proposed trackage agreement, would be undertaking the "extension of its line" and engaging "in transportation * * * by means of such extended line."

7. In holding that Section 1(18) of the Interstate Commerce Act applies to operation begun prior to its enactment.

8. In holding that the Interstate Commerce Commission has jurisdiction over the trackage agreement under Section 1(18) of the Interstate Commerce Act.

9. In holding that, under Section 1(18) of the Interstate Commerce Act, the Interstate Commerce Commission has jurisdiction to prevent the abandonment of trackage rights, the power to compel continuance thereof, and, as incidental thereto, the power to determine what sort of an agreement is compatible with the interests of interstate commerce.

10. In holding that Section 148 of the Railroad Law of the State of New York no longer governs this case.

11. In finding as a fact that operation under trackage agreements over existing lines of another carrier may substantially affect interstate commerce, by affecting the ability of the carriers involved to perform their services as a part of the general transportation system of the country, by unnecessarily duplicating lines or by causing undesirable expense or other burdens.

12. In finding as a fact that an extension arising out of a trackage agreement has a vital effect on interstate commerce and requires national control, and that the same

dangers that are to be guarded against when a railroad extends its line for its own use or leases it for the sole use of another exists where it agrees to a joint use by itself and another road.

Summary of Argument.

The Interstate Commerce Commission assumed jurisdiction over this case on the theory that the Long Island could not, without a certificate, legally continue to use the Pennsylvania tracks under trackage rights as it had done since 1910. The Commission sought to supplant the terms and conditions under which the parties were then operating by making its certificate effective only upon the promise by the carriers to file a new agreement containing different terms and conditions.

Authority for such action is claimed solely under Section 1(18) of the Interstate Commerce Act, under which a carrier must obtain a certificate before it

> (1) "shall undertake the extension of its line of railroad";
>
> (2) shall undertake "the construction of a new line of railroad";
>
> (3) "shall acquire or operate any line of railroad, or extension thereof";
>
> (4) "shall engage in transportation under this chapter over or by means of such additional or extended line of railroad," or
>
> (5) "shall abandon all or any portion of a line of railroad, or the operation thereof."

Section 1(18) is limited to the extension, construction, acquisition or abandonment of lines of railroad, undertaken subsequently to the Act of 1920, and to the use of lines so constructed or acquired. The purpose of Congress was to guard against the construction or acquisition of unnecessary

or competing lines—to give the Interstate Commerce Commission control over acts or things involving capital expenditures and increasing the valuation on which rates must be based and the amount of outstanding securities. Congress acted on the belief that existing interstate facilities ought not to be expanded, except under the supervision and control of the Interstate Commerce Commission, but that the more intensive use of such existing facilities required no such control. It covered construction and acquisition by Section 1(18), but it covered the joint use of terminals by Section 3(4), and there only in so far as compulsion was necessary in order to secure such use (Point I).

This construction is confirmed by the statements made in Congress by those who had drawn and were sponsoring the bill (Point II). It was the construction followed by the Interstate Commerce Commission when it dismissed applications for approval of trackage rights for lack of jurisdiction (Point III) and when it made its recommendations which resulted in the Transportation Act of 1920 (*post*, p. 53).

The Court below erred in holding that the Long Island in operating *over* the Pennsylvania tracks was *operating a line of railroad* within the meaning of Section 1(18). The verb "operate" is used transitively, with "line of railroad" for its direct object, and means to manage and control a line of railroad, and not merely to operate over it (*post*, p. 24). The Court below rejected this because "that would prevent national control." Congress, and not the Interstate Commerce Commission, is the body which determines the extent to which national control shall be exercised; and, in this instance, did not extend its direct control to the use of existing tracks, under trackage rights (Point VI).

The Court below erred in holding that the Long Island in extending its *operation* over the Pennsylvania tracks was extending its *line of railroad*. It based its conclusion on a finding of fact unsupported by evidence and insufficient, if proved, to support the conclusion, and on certain assumed decisions and *dicta*, the effect of which was misunderstood by the Court below (Point VII).

The Court below erred in holding that jurisdiction was properly assumed by the Commission, "because the Long Island, when running its trains under the proposed trackage agreement * * * would be preventing an abandonment." The word "abandonment," as used in Section 1(18), refers to the surrender of the carrier's franchises and property, and not to the mere discontinuance of operation. Congress could prevent a carrier from *abandoning* its line, but, for constitutional reasons, could not require one carrier to submit its road to use by another after the contractual right to do so had expired. The words "extension," "construction," "acquisition" and "abandonment" all refer to lines of railroad owned by a carrier, and not to the use by one carrier of a line owned and controlled by another (Point VIII).

Section 1(18) was not retroactive; and, even if it were assumed that it applied to operation or use, does not apply to operation or use begun ten years before the Act became effective and continued without interruption ever since (Point IV).

Even if it were assumed that Section 1(18) applied to use in general and to this use in particular, the Interstate Commerce Commission, after finding facts which warranted the issuance of a certificate, had no right to withhold that certificate until the carriers should file a new agreement superseding the terms and conditions authorized by the State authorities, under which the carriers were then operating (Point V).

This case involved merely a question of statutory construction; and it was improper to resort to judicial legislation in order to give effect to the policy which, in the opinion of the Court, ought to have been followed by Congress (Point IX).

POINT I.

Section 1(18) of the Interstate Commerce Act confers jurisdiction over the making, by an interstate carrier, of additions to its own line, through construction or acquisition, and over the operation of lines so added, but not over the mere use by such carrier jointly with the owner, of existing lines of another interstate carrier.

Since 1910 the Long Island has been using jointly with the Pennsylvania certain tracks controlled by the latter. The rental paid by the Long Island for such use was that approved by the State authorities. The carriers sought to increase this rental. Having failed to secure from the Transit Commission the full amount sought, they applied to the Interstate Commerce Commission (1) for a certificate, under Section 1(18), that public convenience and necessity permitted continuance of this use, and (2) for an order, under Section 3(4), requiring such use upon the compensation agreed upon by the parties. This compensation represented the maximum which they had sought from the Transit Commission. The Interstate Commerce Commission held that it had no jurisdiction over the application, made under Section 3(4), and dismissed that part. It assumed jurisdiction, however, under Section 1(18).

Although finding that the existing arrangement was beneficial to both parties and to the public, the Commission withheld its certificate. The proposed agreement which the carriers sought to have approved under Section 3(4) was considered under Section 1(18) and was found to be unreasonable to the Long Island (the conclusion reached by the Transit Commission in 1925); and the application under Section 1(18) was denied without prejudice. Later the carriers presented another agreement, to which the Interstate Commerce Commission also found objection. What threatened to be an annoying series of such applications was brought to an end when the Commission advised the carriers of the rental terms which would meet its approval. It there-

upon issued its certificate so conditioned as to become effective upon the promise by the carriers to file an agreement which should substitute the terms which it approved for those under which the carriers were then operating.

The validity of this condition depends upon the validity of the certificate, authority for which is claimed to be found solely under Section 1(18) of the Interstate Commerce Act, as added by the Transportation Act of 1920:

> "§1, par. (18). *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

In *Texas etc. R. R.* v. *Northside Ry.*, 276 U. S. 475, 479, this Court said:

> "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest."

See also *Texas & Pac. Ry.* v. *Gulf etc. Ry.*, 270 U. S. 266, 277-278.

In *Chesapeake & Ohio Ry.* v. *United States,* 283 U. S. 35, 42, it was said, speaking of paragraphs 18 and 20:

> "Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service."

In *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.,* U. S. , decided January 9, 1933, it was said:

> "The purpose of Congress in enacting paragraph 18, as repeatedly explained by this Court, was that though a carrier should desire to extend existing facilities or to construct new ones in territory not previously served, the free exercise of discretion should not be permitted, but the Commission must be convinced that the proposed venture would not drain the railroad's resources and disable it from performing those duties of public service under which it then rested, with consequent detriment to the public in the matter of service and rates."

The intent of Congress was to guard against the unnecessary building or acquisition of new or additional lines, the construction or operation of which might strain the resources of the owner or weaken its competitors. The purpose of Section 1(18) was to prevent the addition to the interstate system of lines which might be superfluous or competing. The statements of those who sponsored the bill clearly shows that the purpose was confined to that (Point II). That the paragraph did not confer jurisdiction over the use of existing interstate facilities, under trackage rights, was recognized by the Interstate Commerce Commission in its rulings dismissing applications for such certificates for lack of jurisdiction (Point III). It also appears from the interpretation and construction of the Act itself.

Under Section 1(18) a carrier must obtain a certificate before it (1) "shall undertake the extension of its line of railroad," (2) shall undertake "the construction of a new

line of railroad," (3) "shall acquire or operate any line of railroad," (4) "shall engage in transportation under this chapter *over or by means of such additional or extended line of railroad,*" or (5) "shall abandon all or any portion of a line of railroad, or the operation thereof."

Certain of these provisions cannot possibly apply to the joint use of existing tracks under trackage rights. Such use cannot be deemed the construction or the acquisition or the abandonment of a line of railroad. These provisions, therefore, may be at once excluded from consideration.

In using the Pennsylvania tracks the Long Island is engaging in transportation. The paragraph, however, does not apply to *all* transportation, but only to transportation "over or by means of such additional or extended line of railroad." The question, therefore, is whether the Long Island, in its use of the Pennsylvania tracks, is engaging in transportation over an "additional or extended line of railroad" within the meaning of Section 1(18). The answer to this depends, in turn, upon whether the Long Island, in beginning its use, was undertaking "the extension of its line of railroad."

The paragraph also requires a certificate before a carrier "shall acquire or operate any line of railroad." It is claimed that the Long Island, in using the Pennsylvania tracks, is operating a line of railroad. The answer to this depends upon whether "operate" means to control and manage a line or includes the mere use of a line controlled by another.

The inquiry then is narrowed down to those provisions of the paragraph which deal with (A) the "extension" of a line of railroad and (B) the "operation" of a line of railroad. These will be considered separately and in turn.

A.

Section 1(18) provides that, without a certificate, no carrier "shall undertake the extension of its line of railroad, * * * or shall engage in transportation over or by means of such * * * extended line," thus distinguishing between *undertaking* the extension of a line and *engaging in transportation over* such extended line. The idea naturally con-

veyed by this is, not of an existing line, but of a line that must first be created before the carrier *can* engage in transportation over it. In the case of an existing line, the only distinction between *undertaking* and *engaging* would be one between initial and continued use, for a carrier would be engaging in transportation the very moment it undertook the use. In the case, however, of a line that had to be constructed before it could be used, the distinction is substantial. The interpretation of the language actually employed, without need of resort to construction, seems, therefore, to indicate that Congress, by Section 1(18), was guarding against the addition of new facilities and not against the increased use of existing facilities.

This is shown in another way. The explanations given in Congress by those who prepared the bill show that Section 1(18) was not new law but was patterned upon the laws of the State of New York and other states (*post*, p. 31). In the State of New York, the purpose of the Legislature in requiring a certificate was to restrain the construction of useless roads (*N. Y. C. & H. R. R. R. Co.* v. *B. & W. El. R. Co.*, 96 N. Y. App. Div. 471, 474 [1904]; *New York Central & H. R. R. R. Co.* v. *Auburn Interurban Electric R. R. Co.*, 178 N. Y. 75). It is a familiar canon of interpretation that the provisions of a State statute, borrowed by Congress, must be construed as they were understood at the time in the State (*Capital Traction Co.* v. *Hof*, 174 U. S. 1, 36).

Paragraph 18 deals with extension, construction and acquisition. The word "extension" can, and naturally does, convey substantially the same idea as "construction." The only difference is that "construction" means the building of a new line, while "extension" means the building of a prolongation to an existing line. Under the rule of *ejusdem generis*, the word "extension" should be construed as applying to the building of additional, and not to the use of existing, trackage. The application of the word "extension" should be confined to acts or things belonging to the same general class as those meant by the words associated with it, i. e., "construct" and "acquire" (*B. & O. R. R.* v. *United*

States, 277 U. S. 291, 300). This is particularly true where the paragraph separately deals with the use, limiting it, however, to use over "such additional or extended line of railroad."

A resort to other portions of the Transportation Act merely confirms the interpretation placed on the words "undertake the extension of its line" and their construction in the light of other provisions in the same paragraph.

For example, Section 1(22) provides:

> "§1, par. (22). *Construction, etc., of spurs, switches, etc., within State.* The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the *construction or abandonment* [these italics ours] of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Again, Section 1(19) requires that, upon receipt of any application for such certificate, notice shall be given to "the governor of each State in which such additional or extended line of railroad is to be constructed or operated." "Constructed" refers to new lines built, and "operated" to old lines acquired. The giving of notice to the governor of each State indicates that the subject matter was of more importance than mere trackage rights, which, as a matter of common knowledge, are numerous and generally of slight extent and importance.

More important is the light thrown by the provisions of Section 1(21), which provides:

> "§1, par. (21). *Power of commission to require adequate facilities or extension of line; penalty.* The commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such pro-

> ceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and *to extend its line or lines:* [these italics ours] *Provided,* That no such authorization or order shall be made unless the commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

It is reasonable to assume that the words "extension of its line," in paragraph 18, and the words "extend its line," in paragraph 21, deal with the same thing, but from different lines of approach. Paragraph 18 is permissive, while paragraph 21 is compulsory (*Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* U. S. , decided January 9, 1933). It is safe to say that, under paragraph 18, a carrier desirous of extending its lines may be *permitted* by the Commission to do so, while a carrier unwilling to extend its lines may be *compelled* by the Commission to do so. Paragraph 21 clearly purports to give the Commission power to compel the making of an extension.

If this be interpreted as a power to compel the making of extensions, by building or buying, there is no inconsistency with other provisions of the Interstate Commerce Act. If, however, it is to be interpreted as a power to compel one carrier to extend its operation over the existing lines of another, there will be a patent inconsistency between the provisions of paragraph 21 and those of Section 3(4), where the Commission is expressly given power to compel an owner of terminal facilities to grant their use to another carrier.

Section 3(4) provides:

> "§3, par. (4). *Terminal facilities; use of and compensation for.* If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

It is hardly credible that Congress, having comprehensively covered the compulsory use of terminals in Section 3(4), would deal with the very same thing in Section 1(21). The rational inference is that Section 1(21) did not deal with the same thing—use, but with a different thing—construction.

Moreover, it will be observed that Section 3(4) carefully provides for the compensation for such use. It is to be such "as the carriers affected may agree upon," or, upon their failure to agree, such as the Commission may fix upon "the principle controlling compensation in condemnation cases." This was required because such compulsory use involves a

taking of the owner's property. Section 1(21), however, makes no provision for fixing compensation. If construed as applying to use, it would similarly involve the taking of the owner's property, and would, therefore, be of doubtful constitutionality. In such case, there would have to be placed upon it the construction which would avoid that doubt (*Missouri Pac. R. R.* v. *Boone,* 270 U. S. 466, 471-472). This doubt would be avoided if the provision were construed as applying only to construction. Section 1(21) then would have to be construed as applying to construction and not to use.

It is apparent that paragraphs 18 and 21 apply to the same thing, so far as they deal with extensions. It follows that, since paragraph 21 does not apply to trackage rights, paragraph 18 does not apply either. Paragraph 18, like paragraph 21, applies only to extensions made by constructing them.

B.

Section 1(18) provides that, without a certificate, no carrier "shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such * * * additional line of railroad."

No claim is, or can be, made that the Long Island, by using the Pennsylvania tracks, has acquired a line of railroad; but, by ignoring the word "acquire" and the expression "engage in transportation" and treating the word "operate" as if it stood alone, it is argued that the Long Island is *operating* a line of railroad, because it is operating *over* a line of railroad.

If the expressions "operate" and "engage in transportation" were identical in meaning, as the above argument assumes, then the word "operate" would be superfluous. As this cannot be presumed, the conclusion must be that "operate" means something different from "engage in transportation."

It is clear that the verb "operate" is used transitively, with "line of railroad" for its direct object, while "engage in transportation" is used intransitively. As a transitive verb, "operate" refers to the complete control and management of a line of railroad, not to the mere use of a line controlled and managed by another carrier (*Bedford-Bowling Green Stone Co.* v. *Oman*, 134 Fed. 441, 450; *Troy & Boston R. R. Co.* v. *Boston, Hoosac Tunnel & Western Ry. Co.*, 86 N. Y. 107, 117, 119).

Operating a line is not the same as operating over a line. The Long Island is operating over a line, but not operating a line. Its use, therefore, does not come within the meaning of the word "operate," but within the meaning of the expression "engage in transportation," which, however, does not extend to *any* line but is limited to "such additional or extended line," i.e., a line constructed or acquired by it after the passage of the Transportation Act.

The reason for following the word "acquire" with the words "or operate" is perfectly clear. It was not for the purpose of covering the use of a line, for this is completely covered by the words "engage in transportation." Paragraph 18 is the only provision of the Act which deals with permission to construct, extend or abandon, but it is not the only provision which deals with permission to acquire. Acquisition is covered by Section 5(2); and as this section contemplates control acquired by various means, some of which do not involve the acquisition of title, it was fitting, in referring to the same matter in Section 1(18), to use the words "acquire *or operate*."

> "§5, par. (2). *Acquisition of control of one carrier by another.* Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to

> approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises."

Similarly, it would seem that the word "operation" is used in the sense of management and control, in that part of the paragraph which speaks of "construction, or operation, or construction and operation of such additional or extended line of railroad." This, however, need not be determined, since these words constitute an enumeration, not of the instances where a certificate is required, but of the things which the Commission must find in order to grant a certificate in the cases where it is required. A certificate was not required here, since the Long Island was not proposing to "operate" within the meaning of that word as used in Section 1(18).

C.

After clear rulings that it had no authority to issue certificates and after issuing certificates in non-contested cases for reasons of convenience (Point III), the Commission for the first time, in the face of active opposition, held that there was "no sound reason preventing the assumption of jurisdiction" under paragraph 18 (R. 337). Its reasons for such assumption were not derived from the construction or history of the paragraph or from any judicial utterance, but were simply based upon the ground that (*Long Island R. R. Co. Trackage*, 162 I. C. C. 218, 221):

> "The power conferred upon us by the act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary" (R. 338).

The theory that the Commission has plenary jurisdiction over interstate carriers flies in the face of the statute and of the rules of construction. Had Congress intended to give plenary power to the Commission, it would have said so in a few words, and so saved itself from the task of framing

the meticulously detailed provisions dealing with the different features of interstate commerce, over which it intended to confer jurisdiction. Being a body created by Congress, the Commission has only such powers as Congress chose to give it. The intention of Congress is the law, and this is to be derived from the plain meaning of its language or, if this is susceptible of doubt, by its construction in the light of the purpose of Congress, as shown by the context of the Act and the circumstances surrounding its enactment.

> *Ozawa* v. *United States*, 260 U. S. 178, 194.
> *United States* v. *Stone & Downer Co.*, 274 U. S. 225, 239.

This theory of "plenary powers" was not urged before the Court below. Present appellees there tried to show that use under trackage rights was equivalent to an extension or to operation, urging that these should be construed in the light of the assumption that it was the purpose of Congress to include such use. Great reliance was placed upon *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244, which dealt, not with trackage rights, but with the making of a junction or physical connection between two interstate railroads. It was urged that, as this Court had found that the Commission had jurisdiction over such matter although not expressly mentioned in the Act, so it should hold that trackage rights also come within it. The following excerpts from the opinion were pointed out as *dicta* to the effect that the joint use of tracks did come within the Act (271 U. S. 244, 248):

> "Prominent among the enlarged powers of the federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another. While none of the amendments in specific terms confers upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question."

And from page 250:

> "The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction."

We assume that this Court, in speaking of the "use by other carriers" and of "the joint use of tracks," meant to refer to such use only in so far as it is covered by Section 3(4), which the opinion expressly mentions. The natural inference is that, where such use is dealt with only by a single section, which the Court mentions, the Court had such use in mind. As Section 3(4) deals only with the right to *compel* such use, it would seem that the language should not be taken as the expression of an opinion that a certificate was necessary to *permit* such use. It would, we submit, be doing violence to the language used and to the presumption against *dicta* to say that it was even a *dictum* to the effect that the Commission had jurisdiction over the matter presented in this case.

The theory of the Court below is summarized in its Conclusion of Law 10 (R. 579):

> "10. Jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island when running its trains under the proposed trackage agreement, (1) would be operating a 'line of railroad' within the meaning of Section 1(18), (2) would be undertaking the 'extension of its line' and engaging 'in transportation * * * by means of such extended line,' and (3) would be preventing an abandonment,

which might occur if the railroads agreed to discontinue joint use of terminal facilities because of burdensome rulings of the State authorities."

These three grounds are discussed, respectively, in Points VI, VII and VIII.

D.

The only section of the Act to deal with use under trackage rights is Section 3(4). The carriers recognized this. Their application to the Commission was for a certificate, under Section 1(18), permitting continuance of use, and for an order, under Section 3(4), requiring the use on the terms and for the compensation agreed upon by the parties (R. 72). The Commission properly dismissed the latter part of the application, on the ground that Section 3(4) applied only where compulsion was necessary; but assumed jurisdiction under the first part (R. 337). Curiously enough, the Commission assumed power to approve the agreement under the first part, although the carriers sought approval of it under the second part which the Commission dismissed.

The policy of Congress, as revealed in the act, had two aspects, (1) to prevent unnecessary construction and additions, and (2) to secure the fullest utilization of existing facilities.* To carry out the first, it put a check upon new construction, the acquisition of lines, and the operation of lines so constructed or acquired—matters which it regarded as not beneficial *prima facie*. It did this by requiring, under Section 1(18), a certificate from the Commission before any of these things could be done. To carry out the second part of its policy, Congress, deeming the full utilization of existing facilities to be *prima facie* beneficial, put no restrictions upon voluntary use and even provided for compelling use, under Section 3(4). It thus dealt with use under trackage rights only in so far as compulsion was necessary in order

* "The public interest requires the fullest utilization of existing terminal facilities in the interest of all the railroads which the industries located upon the terminals desire to use" (*Hastings Commercial Club* v. *C. M. & St. P. Ry. Co.*, 107 I. C. C. 208, 218).

to secure it. Voluntary arrangements of this character were left to the judgment and discretion of the parties involved; and permission was not required for the exercise of such use when voluntarily agreed to. The Commission was not burdened with onerous inquiries into acts presumed to be beneficial, which might degenerate into *pro forma* activity and mere rubber stamping.

The provisions of Section 1(18) do not apply to the use presented in the present case—the joint use of existing interstate tracks, under trackage rights. It applies only to things involving increased capital charges—extension, construction and acquisition. No new or added line is involved here. The tracks used are existing tracks and are not superfluous. The Long Island is not extending *its* line. It is not *operating* a line, but is merely operating *over* a line. It merely enjoys the use of tracks managed and controlled by the Pennsylvania. This use accords with the policy of the act, and does not come within the letter or spirit of Section 1(18).

As the certificate is unsupported by law, the whole of it must fall, including the condition which is dependent upon it.

POINT II.

The statements by those in charge of the Transportation Act in Congress confirm the view that the purpose of Section 1(18) was merely, by restricting construction, to prevent the unnecessary duplication of existing facilities.

If any doubt could be entertained that Section 1(18) applies only to construction and not to use, it would be proper for this Court to take into consideration the statements made in Congress by those who drew and sponsored the bill (*United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318; *Duplex* v. *Deering*, 254 U. S. 443, 474; *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 278). We submit that there can be no doubt that the provision must be construed as

applying only to construction; and cite the following merely in confirmation of the view maintained in the preceding point:

House Report No. 456 (66th Cong., 1st Sess.), submitted with H. R. 10453 by Mr. Esch from the House Committee on Interstate and Foreign Commerce on November 10, 1919, which dealt with the amendments to the Interstate Commerce Act, Section 1, embodied in Transportation Act, Section 402, I. C. A. Section 1(18)-(22), T. A. text division 146-152, said:

> "Section 402 further provides that extensions of an existing railroad or the construction of a new line or the abandonment of a line shall not be permitted unless and until there shall have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require such *construction* or abandonment. *A like provision can be found in the statutes of a number of States.* Your committee believes that the requirement of such a certificate, so far as *extensions* are concerned, will tend to stabilize existing conditions and prevent *the construction of unnecessary or parallel lines* which, without any reasonable hope of profitable operation, would become a burden to the public. A similar provision in the laws of several States has proven successful in preventing the *construction* of weak lines." (Italics ours.)

In a speech, November 11, 1919 (C. R. V. 58, pp. 8309-8319), before the House Committee of the Whole on presenting H. R. 10453, which dealt with the amendment of the Interstate Commerce Act, embodied in Transportation Act, Section 402, Mr. Esch, Chairman of the House Committee on Interstate and Foreign Commerce, which prepared H. R. 10453, said:

> "We believe one main cause of the so-called 'weak sister' has been the unrestricted right of railroads to be *built* wherever their projectors thought fit.
>
> * * * * * * *

How does this bill stop that? In this way: Before a road or an extension thereof can be *built* it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the *building* of a single rod of the extension or of the new line.

* * * * * * *

This is not new law. Several of the States have this same kind of law now, notably the State of New York and the State of Wisconsin and other States, and the law has worked successfully. It has prevented *the construction of new lines* that could not by any possibility have any hope of meeting operating expenses, not to say anything about profits. It would prevent *the construction of some of these short lines* which may have no hope of ultimate financial success. In every way we have felt that this provision would lessen the number of 'weak sisters,' would prevent *the creation of any new ones,* and would strengthen the existing lines. We can get better service by strengthening the existing line than by *creating a rival or parallel line* which would diminish the ability of the first line to make further improvements and betterments." (Italics ours.)

In a speech, December 17, 1919 (C. R. V. 59, pp. 748-750), before the Senate, as in Committee of the Whole, on consideration of S. 3288, which dealt with the amendment of the Interstate Commerce Act, embodied in Transportation Act, Section 402, I. C. A. Section 1(18)-(22), T. A. text divisions 146-152, Senator Cummins, Chairman of the Senate Committee on Interstate Commerce, which prepared S. 3288, said:

"I do not remember just how many States have legislation of this character, but there is a very considerable number of the States which for the protection of their people and the better regulation of their commerce have adopted provisions substantially like the one now sought to be eliminated from the bill.

It presents to the country a question which ought to be considered and ought to be decided without passion or prejudice, and ought to be decided without

respect to the effect which it is supposed it would have upon any particular part of the United States. If there is any one thing from which the transportation system of the country, taken as a whole, is now suffering, it is from the unguided, uncontrolled right of owners to *build* railroads wherever they may see fit to *build* them and whenever they can avail themselves of an opportunity to sell at a profit the securities based upon the supposed *construction*.

The railways of the United States are not built where they should have been *built*. Everybody understands that. A great many have been *built* that never should have been constructed. We are now under the disadvantage of having developed a system which must be maintained because communities have been built up along the railways, and their interests can not be disregarded in the regulations which we shall adopt. The whole trouble to which I referred in my opening statement has arisen because of the *building* of railways simply to make money out of their *construction* and without regard to the possible profit of their operation.

* * * * * * *

We propose here to grant to a governmental body the right to survey the situation, and then *say*, as to a railroad which is to be a common carrier and to be engaged in interstate commerce, *whether* under the circumstances, looking at the future of the community and the opportunities for traffic and everything of that sort, *it is a fair and a reasonable venture upon which the people of the country will be called upon eventually to pay a return.*" (Italics ours.)

In a speech, December 14, 1919 (C. R. V. 59, pp. 862-863), on consideration of S. 3288, which dealt with the amendment of the Interstate Commerce Act, embodied in Transportation Act, Section 402, Senator Robinson said:

"One of the fundamental principles and purposes of this bill is to so organize the railroads of the United States and to so consolidate them into a number of competing systems that hereafter the rates may be so adjusted that all railroads may be maintained. If you strike out this provision you weaken the con-

solidation features of this bill. It is true that in all probability in the future there will not be so many miles of railroad *constructed* the construction of which the public interest does not justify as in the past; but if we are to reorganize the railroads and put them on a sound financial basis we ought not to leave it to the power of any one in any locality to undo the very thing we are trying to do: * * *.

The purpose of this provision in the bill is to recognize as the controlling consideration the right and interest of the public to have reasonable and adequate transportation facilities and *to escape payment for transportation facilities that are not needed and are mere duplications of existing facilities.*" (Italics ours.)

POINT III.

The previous attitude of the Interstate Commerce Commission did not give rise to a practical construction which can be considered in construing the plain language of the statute.

In its brief before the Court below, the Interstate Commerce Commission relied upon the rule that a construction of a statute, made by a body charged with the enforcement of it, is entitled to great respect, and, if acted upon for a number of years, will not be disturbed except for cogent reasons.

In the first place, not this rule, but another, is the one that applies here. The rule relied upon by the Interstate Commerce Commission applies only where the language of the statute is ambiguous and susceptible of two reasonable constructions; and a custom of the department, however long continued by successive officers, must yield to the positive language of the statute. The doctrine of contemporary construction is not given weight where, as here, there is no balance between two reasonable constructions (*United States* v. *Graham,* 110 U. S. 219, 221; *Houghton* v. *Payne,* 194 U. S. 88, 99-100).

In the second place, the conduct and attitude of the Interstate Commerce Commission was never such as to raise a "contemporaneous" or a "practical" construction that Section 1(18) applied to use under trackage rights. "Contemporaneous" it certainly was not; for, when the history of the Act was fresh in mind, the Commission held that the section did not apply to trackage rights, and dismissed applications for such certificates.

Nor was the subsequent action of the Commission of such character as to raise a practical construction. Upon solicitation by applicants who urged that the question was an open one and who desired to observe every possible formality to insure the validity of their undertaking, the Commission issued certificates, being careful, however, to make it clear "that in thus disposing of the matter we do not hold that such certificate is a prerequisite to the lawful renewal of the agreement in question," and emphasizing that it was issued solely because "it is an open question whether the transaction in question is one that requires our approval under paragraph (18) of section 1."

We submit that, in order to invoke the doctrine of practical construction, it is not enough to show merely that the department acted. It must appear that the action was based upon the conviction that the proper construction of the statute required it. Here, as will appear, the Commission issued its certificate not on the ground that the requirement was clear, but on the ground that it was "an open question." In such case, the Court is obviously not bound to consider the *act* and to ignore the *opinion* of the Commission. No light is thrown upon the meaning of the language, except by the conviction of the department when reinforced by its action thereon.

In *Public Convenience Application of T. O. & E. R. R.*, 67 I. C. C. 484 (1921), the Interstate Commerce Commission said:

> "Upon consideration of the record, we find * * * that the arrangement for operation of the trains of either of the applicants over the line of the other is

substantially equivalent to a trackage right only.* Under the circumstances, it is our opinion that the proposals do not fall within the jurisdiction conferred by paragraph (18) of section 1 of the act, and that certificates are unnecessary.

An order dismissing the proceedings will be issued accordingly."

In *Copper Range Railroad Co.*, 67 I. C. C. 502 (1921), on an application to abandon certain joint use of a station and certain trackage rights, the Interstate Commerce Commission said:

"Upon consideration of the record we find that the abandonment proposed in the application consists in cessation of operation by the applicant over a portion of the tracks of the Chicago, Milwaukee & St. Paul Railway Company and the use of the station of the latter company at Mass, Mich., under a trackage right conveyed by contract. Under the circumstances it is our opinion that the proposals do not fall within the jurisdiction conferred by paragraph (18), section 1 of the act, and that a certificate is unnecessary.

An order will be entered dismissing the proceeding."

In *Cleveland Passenger Terminal Case*, 70 I. C. C. 659, 662 (1921), the Interstate Commerce Commission said, after a rehearing:

"We further find that the contracts proposed to be made by the Central with the Big Four and the Nickel Plate grant to the Central trackage rights only and that authority from us to exercise such trackage rights is unnecessary.

A certificate and order will be issued accordingly."

In *Operation of Sherman, Shreveport & Southern R. R.*, 76 I. C. C. 771, 773 (1923), the Commission said:

"As both of the lines between Waskom and Shreveport, over one of which the applicant might operate

* "We have defined the term 'trackage rights' as the right of one carrier to use the tracks of another for a compensation usually varying with the extent of the use" (*Louisiana, A. & T. Ry. Co. Operation*, 170 I. C. C. 602, 606).

> under trackage rights, are at present operated in interstate commerce, a certificate of convenience and necessity under paragraph 18 and following of section 1 of the interstate commerce act is not necessary, and, therefore, so much of the application as seeks authority to acquire and operate under trackage rights will be dismissed."

In *Chesapeake & Ohio-Norfolk & Western Trackage Rights*, 72 I. C. C. 471, 472 (1922), decided prior to the *Sherman* case above, the Commission said:

> "It is an open question whether the transaction in question is one that requires our approval under paragraph (18) of section 1 of the act. However, the applicants have sought that approval and the jurisdictional requirements have been complied with. A certificate will, therefore, be issued. *It must be understood, however, that in thus disposing of the matter we do not hold that such certificate is a prerequisite to the lawful renewal of the agreement in question.*" (Italics ours.)

This attitude indicates that the Commission had not altered its previously expressed view that Section 1(18) did not apply to trackage rights; but, for the convenience of the applicant, merely adopted the practice of putting the validity of the undertaking beyond question, by granting a certificate instead of dismissing the application. The case shows that the action of the Commission was not based upon an opinion that Section 1(18) did apply to trackage rights.

This practice was followed in *Missouri-Kansas-Railroad Company of Texas Reorganization*, 76 I. C. C. 651 (1923), where the trackage rights were merely part of and incidental to a larger program involving acts which did require a certificate, and where, as the Commission observed, "no objection to the granting of the applications has been presented to us" (p. 655). It was also followed in a number of cases, some of which are cited in the footnote to *Chicago & Alton R. R. Co.* v. *T., P. & W. Ry. Co.*, 146 I. C. C. 171, 181. In such cases, the Commission was at pains to repeat in its reports that there was "no objection." In many of them the

trackage rights figured incidentally merely to plans which involved other activities which did require certificates. The presumption is that the practice continued for the same reason for which it was begun, namely, the convenience of the applicant.

In *Operation of Line by A., T. & S. F. Ry. Co.*, 94 I. C. C. 318 (1924), where there was "no objection," a certificate was issued, the Commission saying (pp. 319-320):

> "The applicant contends that neither the letter nor the spirit of paragraph (18) of section 1 of the act requires it to secure a certificate of public convenience and necessity to operate over the spur because such operation is carried on under trackage rights. The applicant has moved to dismiss the application on the ground that we are without jurisdiction in the premises. We are of the opinion that we have jurisdiction. *The proposed operation is more than an operation under an ordinary trackage right. The agreement of June 26, 1919, is in the nature of a joint operating contract.*" (Italics ours.)

Here it appears that the Commission acted on the ground that the proposed agreement was not for a mere trackage right.

In *Proposed Operation By N. P. Ry.*, 111 I. C. C. 689 (1926), the Commission denied an application. In answer to the contention of interveners, the Commission said (p. 696):

> "We are of the opinion that the provisions of paragraph (18) of section 1 cover the operation here proposed."

In that case, however, it appeared (p. 696):

> "It is admitted that the new line is not as safe or as desirable for operation as the old line. The proposed operation would require considerable additional investment of capital and would result in increased cost of operation without a corresponding benefit, so far as appears, of increased revenues, and would thus tend to increase the cost of transportation to the traveling and shipping public."

Similarly, *Operation By Pearl River Valley R. R.*, 111 I. C. C. 580 (1926), although designated as a case of operation "under trackage rights," seems to have been more than that. The applicant proposed "to operate the lumber company's line as an extension to its own main line under a trackage agreement"; to "use and operate the line jointly with the lumber company"; to "assume the cost of necessary repairs"; and "to pay an annual rental of $1" (p. 581). It is apparent that the control of this line, approximately eight miles long, really passed to the applicant and that it was the lumber company which reserved the right to use it. Under these circumstances, the case fell within that part of paragraph (18) which deals with the right to "acquire or operate." It was the lumber company rather than the applicant which thereafter enjoyed trackage rights. Here, too, there was "no objection."

In *Unified Operation At Los Angeles Harbor*, 150 I. C. C. 649 (1929), a certificate was granted where there was "no objection" (p. 650). The agreement there approved, however, seems to have been in the nature of a joint operating contract (see p. 660), over which the Commission took jurisdiction in *Operation of Line by A., T. & S. F. Ry. Co., supra.*

It is unnecessary to follow in detail the progress of the Commission through a multitude of cases. It is sufficient to point out the fact that the Commission began with, and acted upon, the view that it had no jurisdiction over trackage rights; that it began to issue such certificate, where there was no objection, not because it deemed such course to be required by the statute but for reasons of convenience; that it presumably continued such course for the same reason; and that, until the present case arose, it was never called upon to, and never did, declare that it had altered its original view.

We submit that the action of the Commission, under these circumstances, cannot possibly constitute a practical construction that Section 1(18) applies to trackage rights; and that, where it appears that the Commission itself has indi-

cated its belief that it has no such jurisdiction, this Court is not bound to draw the conclusion that it has, from the mere fact that certificates have been issued for a different reason.

POINT IV.

The provisions of Section 1(18) are not retroactive; and, even assuming that they apply to operation under trackage rights, do not apply to operation begun ten years before the paragraph was enacted and carried on continuously ever since.

The provisions of Section 1(18) were not retroactive in their operation (*Detroit Terminal R. Co.* v. *Pennsylvania-Detroit R. Co.*, 15 Fed. [2nd] 507).

In *Public-Convenience Application of T., D. & E. R. R.*, 67 I. C. C. 484, the Interstate Commerce Commission itself said:

> "Upon consideration of the record, we find that construction of the extensions was begun in good faith prior to the effective date of paragraph (18) of section 1 of the interstate commerce act and was diligently prosecuted to completion; * * *. Under the circumstances, it is our opinion that the proposals do not fall within the jurisdiction conferred by paragraph (18) of section 1 of the act, and that certificates are unnecessary.
>
> An order dismissing the proceedings will be issued accordingly."

In *Public-Convenience Application of U. & N. Ry.*, 67 I. C. C. 554, 555, the Commission said:

> "We therefore find that construction was begun in good faith prior to the effective date of section 1, paragraph (18), and that the work has been prosecuted with reasonable diligence, under the circumstances, in accordance with the original plan. It follows that no certificate of public convenience and necessity is required.
>
> An order will be entered dismissing the proceeding."

In *Piedmont & N. Ry. Co.* v. *United States,* 30 Fed. (2nd) 421, 425, it was said:

> "The petitioner, relying upon this history of its activities, and upon the principle of law laid down in Detroit Terminal R. Co. v. Pennsylvania-Detroit R. Co. (C. C. A.), 15 F. (2d) 507, 509, contends that it had actually commenced construction in a substantial way before 1920, by the acquisition and building of its present lines; and that since this work was but a part of an entire unitary project, never abandoned, it must be held that the petitioner had undertaken the construction of the proposed extension long before paragraph 18 of section 1 of the act was passed.
>
> The Commission has given effect to the exception in paragraph 18 in the public convenience applications of the following roads: Texas, Oklahoma & Western R. R., 67 I. C. C. 484; Uvalde & Northern Ry. Co., 67 I. C. C. 554; Gulf Ports Terminal Ry. Co., 71 I. C. C. 759; San Antonio & Aransas Pass Ry. Co., 111 I. C. C. 483. It also passed an order on May 25, 1920, three months after the effective date of the act, in which it notified all carriers, contemplating or engaged in work of construction, to notify the Commission of the facts and circumstances, in order that it might determine whether the work had been actually undertaken as contemplated by paragraph 18, and whether a certificate of convenience and necessity would be required. It announced that if the projected extension or construction should have been actually undertaken in good faith within 90 days after the approval of the act, a certificate would not be required, but that the undertaking must embrace not merely a purpose or intent to extend and construct, but also the actual doing in good faith of acts calculated to complete and effect such purpose. It said that a mere provision in a charter or prospectus, or the making of a preliminary survey, would not in its opinion constitute an undertaking."

The Court below found that the Long Island began to use the tracks of the Pennsylvania in 1910 and has continued that use without interruption ever since (R. 573). In its report, *Long Island R. Co. Trackage,* 162 I. C. C. 218, 220,

the Interstate Commerce Commission found that "joint operation began prior to the effective date of the transportation act, 1920, and has been continuous" (R. 337).

Accordingly, we contended before the Commission and before the Court below that, even if Section 1(18) did apply, in general, to operation under trackage rights, it did not apply to this particular case, where the operation had begun ten years before the Transportation Act of 1920 and has been carried on continuously ever since.

The assumption that use under trackage rights does come within the scope of Section 1(18) necessitates an inquiry as to the particular parts of the paragraph which are supposed to apply to the situation actually presented here, namely, a situation where the Long Island began its continuous use as early as 1910, ten years before the paragraph (which was not retroactive) became effective.

It must be conceded that such use does not come within the parts which require a certificate from the Commission before a carrier "shall undertake * * * the construction of a new line of railroad" or "shall abandon all or any portion of a line of railroad, or the operation thereof." The only parts which can possibly be claimed to apply are those which require a certificate before a carrier "shall undertake the extension of its line of railroad," "shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad."

Paragraph 18 clearly distinguishes between *undertaking* an "extension" and *engaging in transportation* over such "extended line." In view of the fact that the present activity of the Long Island began in 1910, it cannot be said, at this date, that the Long Island, in continuing such use, is *undertaking* "the extension of its line of railroad." The "extension," if such it be, was *undertaken* but once, namely, in 1910. All that can be claimed now is that, by continuing what it then *undertook*, it is engaging in transportation "over or by means of such additional or extended line of railroad." It, therefore, seems that the part of the paragraph which

requires a certificate before a carrier "shall *undertake* the extension of its line of railroad," must also be excluded from consideration.

Moreover, it seems absurd to say that, although a carrier would not have to secure a certificate for an "extension" undertaken in 1910, it would have to secure a certificate, in order to continue using an "extension" so undertaken. Accordingly, it would also seem that the part of the paragraph which requires a certificate before a carrier "shall engage in transportation over or by means of such * * * extended line of railroad," must also be excluded from consideration.

The only other part remaining to be considered is that which requires a certificate before the carrier "shall acquire or operate any line of railroad." It cannot be said that the Long Island has acquired the track which it uses, but, if it were said that it has, it is apparent that it acquired it in 1910. It cannot be said to acquire it anew each day that it continues to use it.

Our contention is that to "operate" is to direct or superintend the working of the road—which the Long Island does not do here. That this is the meaning which the statute gave to the words "operate any line of railroad" is shown by the fact that later on the statute says explicitly "or shall engage in transportation over or by means of such additional * * * line." We submit that Congress did not use the word "operate" to convey the same meaning as the words "engage in transportation." Here, again, we think it reasonable to say that the carrier would not be required to obtain a certificate in order to continue the use of something which it had lawfully *acquired* before the Act took effect.

It, therefore, seems safe to assume that use under trackage rights does not amount to the construction, acquisition or abandonment of a line of railroad; that the continuance of such use, begun before the Act became effective, does not constitute the *undertaking* of an "extension"; and that the use of Pennsylvania tracks by the Long Island must come, if at all, within those parts of Section 1(18), which use the words "operate," "operation" and "engage in transportation."

We will assume, for the purpose of argument, that the words "operate" and "operation" mean the same as "engage in transportation," thus bringing the matter down to a point where the claim is that Section 1 (18) covers cases where one carrier uses the tracks of another, by operating cars over them, jointly with the owner.

Assuming, then, that the statute would apply to such use initiated since 1920, we point out that the use in question began in 1910 and has been continuous. It would seem that, since the paragraph is not retroactive as to construction or extension or acquisition or abandonment, all of which come clearly within the scope of the Act, it cannot be retroactive as to "operation" which doubtfully maintains its claim to a place in the sun. We think that, even if the statute had expressly included the exercise of trackage rights, this would have to be construed, like the other and clearer items, as giving the Commission no jurisdiction over use under trackage rights which were already being exercised when the Act went into effect. We submit that the same rule as to the non-retroactive operation of the statute should be applied to things which are doubtful just as well as to things that are clear.

The answer which the Court below made to our arguments is found in its Conclusion of Law 7 (R. 579):

> "The contention of the Transit Commission that the order of the Interstate Commerce Commission is invalid because it affects an existing relation is without foundation."

In ruling out our contention that the order was invalid because it affected an existing relation, the Court might have been proceeding on the view, either (1) that there was an existing relation but that the Act was retroactive, or (2) that the Act was not retroactive but that there was no existing relation. Apparently, it proceeded upon the latter view; for its Finding of Fact 19 was (R. 577):

> "The trackage agreement approved by the Transit Commission expired several years ago. From that

> time until the new trackage agreement dated March 10, 1932, which was approved by the Interstate Commerce Commission, the Long Island was a mere tenant at will, whose right to use the Pennsylvania terminal had expired."

The Interstate Commerce Commission claimed that it had jurisdiction because Section 1(18) embraced "operation." We replied that, as the Act was not retroactive, jurisdiction could extend only to "operation" begun after the Act, and that, as this "operation" had begun before that, the Commission had no jurisdiction over it. It has never been denied that this "operation" has been continuous. In its report, *Long Island R. Co. Trackage,* 162 I. C. C. 218, 220, the Interstate Commerce Commission said that "joint operation began prior to the effective date of the transportation act, 1920, and has been continuous" (R. 337); and, in its Findings of Fact 19 and 20, the Court brought the matter down to date, by finding that from the time the trackage agreement approved by the Transit Commission expired until the new trackage agreement dated March 10, 1932, "the carriers continued to operate under conditions approved by the Transit Commission" (R. 577). Our contention was that, if the Interstate Commerce Commission did have jurisdiction over operation under trackage rights, it had no more jurisdiction over such operation begun prior to the Act than it had over the continuance of transportation by means of additional or extended lines, acquired or constructed prior to the Act. Assuming that "operation" were important, we felt that it was toward "operation" that reasoning should be directed.

The Court, however, supported the jurisdiction of the Commission on a different ground. It appeared that the written agreement which had originally fixed the terms and conditions of operation was for a limited term which had expired. The Court treated the expiration of this agreement as equivalent to a discontinuance of operation—and this, in spite of the fact that operation was seen, and found, to be continuing. It apparently held that the operation had *legally*

ceased (although notoriously continuing *in fact*), because the written agreement fixing the rental had expired by its terms.

It is not easy to see how the legal conclusion, even if sound, that the right to operate ceased when the written agreement terminated, proves that long-continued operation becomes subject to the jurisdiction of the Interstate Commerce Commission. The thing assumed to be embraced by Section 1(18) was operation, not written agreements. We submit that operation begun before the Act was thereafter carried on continuously does not come within its jurisdiction merely because the parties from time to time revise the terms under which it is carried on.

Assume that operation had actually been discontinued in fact after the Act. That, of itself and in the absence of a desire to resume operation, would not occasion the issuance of a certificate *permitting* operation, which was what the carriers sought in this case. A mere discontinuance of operation would call, at most, for a certificate of "abandonment." But here the certificate was sought and granted to permit operation, not abandonment. Such certificate would be called for only in the case of *new* operation, or, at most, where there had been a definite discontinuance of long-continued operation and an attempt to renew it—a situation not presented here. Our contention was that there was no new operation, because the operation had been continuous. To meet this, the Court below treated the operation as having theoretically expired; but, in order to meet the objection that the certificate was to permit operation and not to authorize its discontinuance, it treated the operation as actually continuing.

While we contend that it is the fact of operation, rather than the right to operate, which should be determinative in such case, our principal attack is directed against the assumption that, when the written agreement terminated, the Long Island ceased to have a *right* to operate. The Court's own finding that the Long Island is "a mere tenant at will" seems inconsistent with this; for a tenant at will has an

estate—of uncertain terms, it is true, and capable of being terminated by proper notice, but conferring rights upon the tenant, so long as the tenancy continues. In New York, the proper notice for termination of a tenancy at will is thirty days (N. Y. Consolidated Laws, Chap. 50; Real Property Law, Sec. 228). If the Court's statement means that the Long Island has no right as against the Pennsylvania to remain in occupancy for a long, fixed term, it is correct; but, if it means that it is a trespasser and can be ousted at any time, it cannot be maintained. It cannot possibly mean that the Long Island is not operating, or that it is operating without right.

Actually, however, the Long Island was not a tenant at will but a tenant from year to year. It entered into the terminal pursuant to a valid agreement, duly approved by the State authorities. Several similar agreements, so entered into and approved, have been in force (R. 341, 566). The agreement approved by the Transit Commission on July 28, 1925, was for the term of one year and was retroactive to July 1, 1923 (R. 336). As the Interstate Commerce Commission found, "it technically expired on December 31, 1925" (R. 337). After it had so expired, the rental, as the answer of the carriers admits, "was computed and paid in the same manner as if the said expired agreement had been in force and effect" (R. 48), and the carriers, as the Court below found, "continued to operate under the conditions approved by the Transit Commission on July 28, 1925" (R. 577). This they were legally obliged to do, since a tenancy from year to year was created and the conditions of the original agreement applied, when the Long Island held over with the acquiescence of the Pennsylvania (*Kennedy* v. *City of New York*, 196 N. Y. 19, 23; *Peyton* v. *Smith*, 5 Pet. 485, 490 (star pages); *Black* v. *La Porte*, 271 Fed. 620, 623).

The Court below said in its opinion (R. 572):

> "The argument would apparently preclude jurisdiction perpetually, whenever a carrier having a lease in 1920 holds over with the acquiescence of its lessor. Such a result has no rational basis."

As a possible rebuttal of this charge of utter irrationality, delivered *ex cathedra,* attention is invited to the following considerations:

We are dealing here with a trackage right, claimed to come under Section 1(18), which grants use without control, and not with a lease, coming under Section 5(2), which gives both use and control. As to operation under a trackage right, begun prior to 1920, it is conceded that the result feared by the Court below would follow, so long as the use were continued with the acquiescence of the owner. We claim, however, that the Interstate Commerce Commission should not be held to have jurisdiction merely because, unless it were given jurisdiction, it would have no jurisdiction. If, before 1920, a physical extension or a new road had been built or acquired, the Commission would have been perpetually precluded from jurisdiction, under Section 1(18), over its operation. If, in 1910, the long Island had begun to use the terminal under a written agreement giving a perpetual trackage right, the Commission would have been equally precluded from jurisdiction, under such paragraph. So, if it had entered into no written agreement or had entered into a written agreement expressly providing for a tenancy at will, the Commission would have been precluded from jurisdiction, under Section 1(18), so long as the use continued; and the Commission would have had no jurisdiction under any other section, since there is none which gives it authority, independently, to regulate the mutual agreement, by which the parties themselves determine what the rental shall be. How, then, can the Commission have jurisdiction over a tenancy raised by operation of law from their acts, when it would have no jurisdiction over a tenancy created by their agreements and acts, under sanction of law?

As the operation began prior to 1920, the right to issue a certificate must require, at least, a showing that operation is to be resumed after an actual discontinuance of such operation. We have shown that there was no break in operation and that the Long Island always had a right to operate. Can a break in operation be spelled out of the fact that this use had to receive the permission of the State?

Under the common law of the State of New York a railroad corporation had no authority to transfer or lease its road, unless authorized by statute (*Troy & Boston R. R. Co.* v. *Boston, Hoosac Tunnel & Western Ry. Co.*, 86 N. Y. 107, 117). Section 148 of the Railroad Law of the State of New York (N. Y. Consolidated Laws, Chap. 49) gives a qualified authority, as follows:

> "Subject to the permission and approval of the commission having jurisdiction, any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. * * *"

Under this provision, the carriers applied for and received the permission of the Commission having jurisdiction. This permission was subject to the condition that the operation should be conducted according to terms and conditions approved by the State Commission. Various agreements embodying these terms and conditions were from time to time approved by the State Commission (R. 316, 566). Such terms and conditions were binding upon the carriers, until another agreement fixing other terms and conditions was duly approved. Accordingly, the carriers were obligated to, and did, up to the time when it was claimed that the agreement of March 10, 1932, approved by the Interstate Commerce Commission, went into effect, operate under the conditions last approved by the Transit Commission (R. 48, 577). Indeed, it was because the carriers were bound by the condition of the permission, to operate according to terms of the last agreement to be approved by the State authorities, that the carriers found it necessary to apply to the Interstate Commerce Commission for its approval of the new agreement (March 10, 1932), which provides that "any agreement heretofore existing * * * shall be in all things superseded by this agreement as of January 1st, 1931" (R. 561).

Other carriers also exercise trackage rights into the same terminal. With certain exceptions, their situation is the same as that of the Long Island. For one thing, they are not under the same necessity of securing permission from the State. Again, they operate across State lines, while the Long Island does not. Furthermore, they are independent and capable of dealing with the Pennsylvania at arm's length, while the Long Island is controlled by the Pennsylvania and, if it were not for State control, would have to "agree" to any rental the Pennsylvania determined to exact. The Interstate Commerce Commission has never interfered with these other carriers (see Sec. 1[20]), when their trackage agreements expired (R. 550, 403). Aside from these things, the situation is the same for all. Do these differences permit a construction of Section 1(18) which gives the Interstate Commerce Commission jurisdiction over use by the Long Island, but not over use by the other carriers?

It would seem that Procrustean methods alone could draw from the plain general language of Section 1(18) a construction that would deny to the Interstate Commerce Commission jurisdiction over the Lehigh Valley which operates, across State lines, into the terminal from the west, but would grant it over the Long Island which operates, entirely within the State, into the terminal from the east.

As the Long Island operation began before the statute became effective and as there has since been no break in the operation, in the relation of the parties, in the right to operate, in the permission granted by the State, in the obligation to operate according to the conditions accompanying the permission, or in the observance of such conditions, it is impossible successfully to contend that this operation began, or can be deemed to have begun, after Section 1(18) went into effect. It follows, therefore, that the Interstate Commerce Commission was not called upon, and had no authority, to issue a certificate as a condition precedent to the further continuance of such operation, and, therefore, no power to attach the condition requiring the substitution of other terms and conditions for those under which the carriers were then operating.

POINT V.

Even assuming that the Commission did have jurisdiction over this particular trackage right, it would extend merely to the granting of the certificate; and the matter of controlling the contractual rights and obligations of the parties would remain with the State.

The Court below found in its Conclusion of Law 8 (R. 579):

> "8. The contention that the certificate of convenience and necessity ought not to have been made upon the condition imposed cannot prevail."

The reason given in the opinion was that Section 1(20) "expressly empowers the Commission to attach conditions to a certificate" (R. 572). Our contention was not so crude as to have been based on ignorance of this fact. It was that even this provision did not give unlimited power to the Commission, and that, assuming the power to issue a certificate at all, the Commission had found a state of facts which entitled the applicants to a certificate without any condition whatsoever (R. 338).

The purpose of Section 1(18) was to prevent interstate carriers from weakening themselves (*Texas etc. R. R.* v. *Northside Ry.*, 276 U. S. 475, 479); and so, when the Commission found in *Long Island Railroad Company Trackage*, 162 I. C. C. 218, 221-222, that "the service to the public and the benefit to the carriers by the operating arrangement between these companies are entirely uncontroverted" and that "the need for continued operation by the Long Island in this manner may be safely assumed to have been demonstrated" (R. 339), the Commission should have issued its certificate, if it had power to do so.

In spite of the provisions of Section 1(20), the power of the Commission to impose conditions is not unlimited (*United States* v. *Chicago, etc., R. Co.*, 282 U. S. 311, 324, 342); and our contention was that, when the Commission

had found, as in effect it did, that public convenience and necessity required a continuance of operation, it was under a duty to issue its certificate, and that its action in withholding it, in order to assume a power to regulate the terms—a matter over which it otherwise had no power—was arbitrary.

We do not contend that the financial effect of any arrangement which comes within its jurisdiction is not an item to be considered in determining whether public convenience and necessity permit it; but we do contend that, after a finding that the effect is not to weaken either carrier, applicants have made out a clear case and the certificate should be issued without condition.

This question can be considered as if it involved only private corporations and their rights of property, and was free from any connection with the State. Suppose that the Pennsylvania and the Lehigh Valley had made a *bona fide* attempt to safeguard their respective interests and had embodied the meeting of their minds in an agreement, and, having met every requirement of the section, had been refused a certificate on the ground that the agreement did not accord with the Commission's idea as to its "fairness and reasonableness." What would the Court say when they came before it, contending that, by imposing an unwarranted condition, the Commission had deprived them of property rights to which they were entitled under the statute?

In order to justify its refusal to issue a certificate, the Commission was compelled to redefine the purpose of Section 1(18). According to this Court, that purpose was to see that carriers did not weaken themselves; but the Commission set for itself a still higher goal and one infinitely more difficult of attainment. In *Long Island Railroad Company Trackage*, 162 I. C. C. 218, 221, it said (R. 338):

> "The case is brought to issue mainly because of the possibility of increased fares on the Long Island, but consideration of the questions of rental, degree of use, and the like which are now presented must be weighed entirely on the showing of fairness and reasonable-

> ness and should not be influenced by the contingency emphasized by the protestants. The Pennsylvania and the Long Island are entitled to equally fair treatment in the matter."

The Interstate Commerce Commission appears to have altered its view as to its right to meddle with the rental, just as it changed its view as to its right to deal with trackage rights.

In *Chicago & Alton Railroad Co.* v. *T. P. & W. Ry. Co.*, 146 I. C. C. 171 (1928), the T. P. & W. had entered into an agreement granting to the Alton the right to use jointly with it certain main tracks. In 1927, the T. P. & W. exercised its election to cancel the agreement, but later offered to renew it at a minimum annual rental of $50,000. The Alton regarded this as excessive, and filed a complaint with the Commission, praying for an order under Section 3(4) and for an emergency order under Section 1(15), requiring the T. P. & W. to permit the Alton to operate its trains over said tracks.

The Commission issued an emergency service order under Section 1(15), but subsequently vacated it. Aside from this, the application resulted only in opinions, majority and dissenting. The majority held that the Commission had power, under Section 3(4), to require the use of the tracks, and, under Section 1(18), to prevent discontinuance of operation. It made, however, no order under either section. It apparently hoped to frighten the parties into continuing the *status quo*, by its threat to prevent by injunction, under Section 1(20), the discontinuance of operation, which it said was prohibited by Section 1(18). After convincing itself that the contention "that the parties have a legal right to rely on the terms of their contract" could not be sustained, it concluded (146 I. C. C. 171, 182):

> "We express no opinion as to the adequacy of the rental or the propriety of the other terms and conditions under which the Alton is now operating over the tracks of the T., P. & W. We have no authority to

> adjust that matter in this proceeding. The law, no doubt, provides a remedy for any injustice in that regard."

That the Commission has no power to adjust the matter of rental is confirmed not only by the absence of specific delegation of such power, but also by the rule that a State power is not to be taken away as the result of doubtful inference (*Texas* v. *Eastern Texas Railroad Co.*, 258 U. S. 204, 217, 218; *Atchison Railroad* v. *Railroad Commissioners*, 283 U. S. 380, 393, and cases there cited).

The State power, exercised through Section 148 of the Railroad Law, is undisputed. Acting under this provision, the companies have made applications for the approval of their contract since 1910 and since the Transportation Act of 1920. It was to escape from the terms and conditions last approved (1925) by the State authorities that the companies applied to the Interstate Commerce Commission in 1929. Had the carriers not been bound by these terms, they would never have applied to the Commission, and the Commission would not have found it necessary to suspend the issuance of its certificate until an agreement was made which expressly superseded the existing agreement.

The Commission, in discussing the policies which it recommended, should be carried into law (1919 Ann. Rep., p. 2), outlined certain provisions as essential and expressly recognized the powers then vested in the States. Its recommendation of policy as to limitation of railroad construction, in response to which Section 1(18) was added to the Transportation Act in 1920, was as follows:

> "Limitation of railway construction to the necessities and convenience of the Government and of the public and assuring construction to the point of these limitations. The thought underlying the first part of this suggestion is that in some instances, for speculative or competitive reasons, railroads have been built in excess of the reasonable demand and in excess of the necessities of the territory built into, as well as of its reasonably prospective traffic. A railroad once

> built ordinarily must be operated and permitted to earn a living. The public should not be burdened with the maintenance of two or more railroads when one would substantially answer every legitimate purpose. In this connection it would be desirable that in the exercise of its powers the Congress should say that no railroad shall be constructed or extended that is to engage or is engaged in interstate commerce unless, *in addition to required authority from the State*, a certificate of public convenience and necessity is secured from Federal authority. * * *." (Italics ours.)

The Commission itself held that the terms of the agreement in this case were a matter of local concern, saying (R. 336):

> "It is true that the amount of rental which the Long Island pays to its parent company is a matter that primarily concerns intrastate passenger traffic, indeed hardly more than traffic within the suburban zone of the city, and that the public interest affected might appear to be entirely local."

Congress carefully considered the matter of granting to the Commission the power to pass upon the terms of agreements between carriers, but refused to encroach upon the authority vested in the States. While the bill that is now the Transportation Act of 1920 was pending in Congress, Congressman McClintic of Oklahoma offered, unsuccessfully, the following amendment (Congressional Record, November 15, 1919, p. 8578):

> "Provided, further, that the Commission is hereby given authority to require a carrier to maintain his present arrangement or to make new arrangements, relative to the joint use of depots, *upon such terms as shall be found by the Commission to be just and reasonable*. No carrier shall be allowed to discontinue the use of a depot in connection with another carrier until proper application has been made to the Commission." (Italics ours.)

Chairman Esch, one of the authors of the bill, in speaking of the amendment, used these words:

> "The matter which the gentleman from Oklahoma seeks to reach by his amendment lies almost wholly within the police power of the several states. There have been amendments offered to this bill seeking to preserve such police powers. The committee in framing the bill has sought not to encroach upon such powers. The matters of depots and joint use of depots is practically in the jurisdiction of the State Commissions, and all but one of the states have such Commissions. In such small matters the detail should be left within the jurisdiction of the state authorities, who know the situation, know the conditions, and know how best to meet the needs. There is, however, a provision in this bill providing for the joint use of terminals."

The rejection of the McClintic amendment shows that, while Congress vested the Commission with extraordinary powers, it did not include among them the right to dictate the terms of agreements between carriers, relative to the joint use of terminals.

Even assuming that Section 1(18) applies to operation under trackage rights and to such operation begun long prior to the Transportation Act, there is no power to dictate the terms of agreements covering such operation. The power of the Commission, in this respect, is limited to determining whether the operation is or is not consistent with public convenience and necessity. If its findings show that operation under the terms to be observed is beneficial to the public and to both carriers, it is under obligation to issue the certificate. It cannot refuse, in order that it may enforce the adoption of terms which it prefers but is otherwise powerless to exact. In the absence of express language such power is not to be implied, especially where, as here, it would unnecessarily deprive the State of an unquestioned power.

POINT VI.

The Court below erred in holding that the Long Island in operating, under trackage rights, over tracks of the Pennsylvania was operating a line of railroad, within the meaning of Section 1(18) of the Interstate Commerce Act.

In answer to our contention that Section 1(18), construed according to the rules of construction and particularly according to the rule of *ejusdem generis,* gave the Interstate Commerce Commission control only over undertakings which involved capital expenditures, such as the construction of new lines or extensions and the acquisition of lines, the Court below said that "the difficulty with this position is that it disregards the broad purposes of the Amendment to the Interstate Commerce Act (of 1920) under which Section 1(18) was adopted" (R. 569).

That is, the Court below subordinated or ignored the rule of *ejusdem generis,* because the conclusion reached by such method of construction would conflict with the "broad purposes" which it assumed had motivated the Congress in adopting the amendments of 1920.

What were these assumed "broad purposes" and how did the Court divine them? It said of the Act that "its general purpose was to control railroads, whose operations affected interstate commerce, in such a way as to avoid excessive expenditures by the building of unnecessary lines and to prevent injurious competition and the abandonment of useful arteries of commerce" (R. 569).

We have never questioned this proposition. In fact, we claim that it bears out our contention. We say that the purpose of the Act is *limited* to "building," to "injurious competition" and to "abandonment," and that it does *not* embrace the use of existing tracks under trackage rights, where none of these things is involved.

Clearly, in order to justify its conclusion that Congress intended to bring trackage rights within the provisions of

Section 1(18), the Court below had to invoke a purpose different from the above. It did so. It said that its conclusion that Congress had so intended was reached "in view of the settled governmental policy of control of interstate transportation by a single body charged with the duty of supervising it as a whole" (R. 570).

Although we deplore it, we need not pause to discuss the policy of first assuming for a statute a "general purpose" and then construing particular parts of it in such a way as to conform to such assumed purpose. We believe that there is greater assurance of getting at the true intent of the Legislature and less danger of judicial legislation, if the contrary course be followed and the "purpose" arrived at by generalization from the separate parts, interpreted and construed according to settled rules of construction. We are, however, not driven to defend this thesis, for, we submit, that even assuming such method, it should be followed only where there are clear and convincing indications of such "purpose."

We submit that, assuming adequate indications of any such purpose, the purpose stated is inadequate to justify the conclusion that trackage rights must be included under Section 1(18). We do not question that the policy is to have interstate transportation controlled through a single body, the Interstate Commerce Commission, rather then by numerous Federal agencies; but we submit that the fact that Congress gave control to a single agency, instead of several, furnishes no indication as to the extent of the powers which Congress gave to that agency. The fact that the Commission has all the powers which Congress has delegated hardly compels the conclusion that Congress has delegated any particular power.

The Court below did not say that its premise compelled that conclusion. Its Conclusion of Law 3 was (R. 578):

> "It is the settled governmental policy to control interstate transportation by a single body charged with the duty of supervising it as a whole; and, in view of this, it seems reasonable to construe the words

> 'operate any line of railroad,' found in Subdivision 18 of Section 1, as embracing any railroad having interstate relations, that runs its trains over the lines of another, under a trackage agreement entered into between the two roads."

Its conclusion was based upon its view of the assumed purpose of the Act. It went no further than to say that it was "reasonable" to construe the words "acquire or operate any line of railroad" as embracing mere use under trackage rights. It recognized that it was not driven to this conclusion by any irresistible necessity, for it conceded that "it is true that the clause might be interpreted as directed only to a railroad owning, leasing or maintaining the tracks used" (R. 570). It rejected this interpretation only because "it seems hard to justify a definition that would prevent national control of such important arteries of interstate commerce as are railroads using the tracks of other railroads engaged therein" (R. 570).

"National control" is, we submit, by no means synonymous with "control by the Interstate Commerce Commission." The power to regulate interstate commerce resides in Congress; and as Chief Justice Waite said in *Hall* v. *DeCuir*, 95 U. S. 485, 490:

> "This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution."

Congress, which alone determines to what extent interstate commerce shall be regulated, does not impair national control, when it decides to give its delegate no power over trackage rights. It is not obliged to push its power to the utmost possible extent; and, particularly in view of the

tentative and experimental way in which it has approached the regulation of interstate commerce, there is no presumption that it does legislate on any such basis.

It is not for the courts to criticize the wisdom of Congress or to remold its acts nearer to the heart's desire, through the exercise of its power to construe. All that the courts may properly do is to inquire whether the language used by Congress reveals an intent to exclude or to include a particular matter. In this case, the sole question is whether the words "acquire or operate any line of railroad" were intended to give the Interstate Commerce Commission control over the use of existing interstate tracks under trackage rights.

In our Points I, II and III, we have tried to show why the interpretation and, indeed, the construction of its language reveals a clear intent to refrain from dealing with trackage rights, except to the extent provided in Section 3(4). In this point, we have tried to show that "the difficulty with this position" as viewed by the Court below—its reasons for subordinating these considerations—are inadequate for the purpose, and that its method was wrong. It resorted to *construction* before exhausting *interpretation*. It tacitly conceded the force of our interpretation, but reached a different result by invoking "broad purposes" and "policy," which, even if admitted, were inadequate to support the conclusion reached. We submit that the intent of Congress, as shown by the considerations urged in our early points, cannot logically be overcome by the reasons advanced in the opinion and findings of the Court below.

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POINT VII.

The Court below erred in holding that the Long Island in operating under trackage rights over tracks of the Pennsylvania was extending its line of railroad, within the meaning of Section 1(18) of the Interstate Commerce Act.

The Court below held that the Long Island Railroad Company, in using jointly with the Pennsylvania the existing tracks of the latter, was undertaking "an extension of its line of railroad" and was engaging in transportation by means of such "extended line" (R. 579). It held that the term "extension of its line of railroad" was not confined to trackage built as an extension to an existing road owned by it, but embraced also the use under trackage rights of existing lines owned by another carrier (R. 578).

This conclusion was based partly upon a finding of fact and partly upon certain authorities referred to in its opinion.

A.

Its finding of fact was that "the same dangers that are to be guarded against when a railroad extends its line for its own use, or leases it for the sole use of another, exist where it agrees to a joint use by itself and another road" (R. 577).

It thus recognized that an obvious purpose of the statute was to control new construction, but it reasoned that, since the danger from joint operation over an existing road was the same as that from the construction of a new road, Congress must be presumed to have placed them both in the same category and embraced them both in the provision of Section 1(18).

Parenthetically, it may be pointed out that there was nothing in the evidence before the Court which afforded any basis for this finding, and we question whether such matter comes within the province of judicial notice. It must be

conceded that the conclusion is questionable, even if it be not admitted that it is contrary to the fact. New construction would involve an expenditure of fixed capital, an increase in the amount of valuation on which rates had to be based, a possible increase in the amount of securities, and the possibility of impairing the resources of one existing line by the creation of a new parallel or competing line. The joint use of facilities already constructed could do none of these things. Instead of increasing the physical structure, the rate base, and the securities outstanding, the use of existing tracks under a trackage agreement would leave all these things as they had been and would result in fuller utilization. Granting that additional operation would result in additional expenses, these would obviously be different in character from those caused by new construction. The burdens of a newly constructed line would consist of capital expenditures plus operating expenses, while the expense of operating an existing line would consist of operating expenses minus capital expenditures, and the existing carrying charges would not be affected. We submit that it cannot be regarded as established that the dangers from new construction and those from using existing construction are *the same*.

We submit that any force derived from an argument that the jurisdiction of the Interstate Commerce Commission over new construction must extend also to joint operation over existing construction, because the dangers arising from the two are the same, is destroyed by the dropping out of the essential link, namely, the finding of fact that the dangers *are* the same.

Moreover, be the relative dangers what they may, new construction is certainly different from the joint operation of existing facilities, under trackage agreements. Congress could, if it wished, make a distinction between the two. There was a substantial basis for this. There is no principle which compels it to legislate in respect to both. It is under no legal or logical compulsion to couple with one thing which it believes should be dealt with another and different thing which the Court believes should have been dealt with.

It is only by judicial legislation that a statute can be expanded to embrace something which the Congress never intended to embrace.

B.

The authorities relied upon by the lower Court as supporting the view that the Long Island, in exercising trackage rights over Pennsylvania tracks was operating an extension of its own line, appear in the following excerpt from the opinion of the Court below (R. 570-571):

> "The decisions of the Interstate Commerce Commission first denied and later merely doubted its jurisdiction over such trackage agreements, but for some ten years the decisions have been the other way. In Cleveland, C. C. & St. L. Ry. Co. v. Commerce Commission, 146 N. E. (Ill.) 606, the Supreme Court of Illinois treated a trackage agreement as an 'extension' under Section 1(18). In Cleveland etc. Ry. v. United States, 275 U. S., at p. 409, the Supreme Court sustained the jurisdiction of the Interstate Commerce Commission under another section of the Act stating that 'the order gave no trackage rights' and impliedly agreeing with the Illinois Court on the law but differing as to the facts and the section applicable to the case. In I. C. C. v. Los Angeles, 280 U. S. 52, the Supreme Court seems to have approved an order of the Interstate Commerce Commission for the joint use of terminal facilities. Justice Brandeis, moreover, remarked in Alabama Ry. v. Jackson Ry., 271 P. S., at p. 249, that:
>
> > 'The only limitation set by Transportation Act, 1920, upon the broad powers conferred upon the Commission over the construction, extension and abandonment of the lines of carriers in interstate commerce, is that introduced as paragraph 22 of §1, which excludes from its jurisdiction "spur, industrial, team, switching or side tracks, located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." '"

1. On the face of the opinion, there would appear to be an inconsistency between the statement that "the Supreme Court of Illinois treated a *trackage agreement** as an 'extension' under Section 1(18)" and the statement by the Supreme court of the United States that "the order gave *no trackage rights.*" An examination of the cases cited reveals that in neither of them was a trackage agreement involved. The case before the Illinois Court dealt with the building of a private side track; the case before this Court with the switch connection with this private side track.

2. It is true that the Supreme Court of Illinois voided the order of the State Commission, which approved the building of the private side track, on the ground that this track would be an extension of the railroad within the meaning of paragraphs 18 to 21, and, therefore, that the State had no jurisdiction, because that of the Interstate Commerce Commission was exclusive. It was not true, however, that the Supreme Court of the United States in *Cleveland etc. Ry. v. United States,* 275 U. S. 404, 409, agreed, impliedly or otherwise, with the conclusion that the track would constitute an "extension."

What happened was that the Interstate Commerce Commission ordered the construction, maintenance and operation of the switch connections, under Section 1(9) and that the carrier sought to have this order set aside on the ground that the power of the Commission to deal with side tracks was abrogated by the provision of paragraph 22 that "the authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State." The contention of the carrier, therefore, involved the proposition that the track *was* an "extension" within the meaning of Section 1(18). The denial of this contention involved a ruling that the track was *not* an "extension." This Court denied the contention, saying (275 U. S. 404, 408):

> "Paragraph 22 in no way affects the power conferred by paragraph 9. By its terms, it operates as a

* So designated in the brief of the Interstate Commerce Commission below.

limitation only upon the authority conferred upon the Commission in 1920 by paragraphs 18 to 21. These paragraphs relate to the construction, acquisition, extension and abandonment of a railroad. They deal primarily with rights sought to be exercised by the carrier. Compare *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 345; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Sante Fe Ry. Co.*, 270 U. S. 266; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244, 249. In denying their application to side tracks or spurs, paragraph 22 refers to tracks built by the carrier as a part of its railroad. Compare *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 285, 290. Paragraph 9, on the other hand, relates to switch connections with private sidings built by the shipper."

The case did not involve an exercise of trackage rights and anything said in respect thereto is dictum; but so far as the language of the Court has any bearing on the issue in the instant case it is corroborative of our contention that Section 1(18) is limited to tracks *built* by a carrier as part of *its* railroad.

3. The brief of the Interstate Commerce Commission in the Court below laid stress upon the following sentence from the opinion of this Court in the *Cleveland* case (275 U. S. 404, 409): "Furthermore, the order gave the Big Four [the carrier] no trackage rights over the Coal Company's [the shipper's] tracks." Apparently the thought was that, *had* the order given trackage rights, the ruling would have been different—i. e., equivalent to a ruling that the carrier in operating over *these* tracks would have been undertaking an "extension." We submit that this conclusion does not necessarily follow from what the Court said. It may, or may not, be that operation over *private* tracks or over any tracks not already brought into the interstate system would constitute an "extension" of the carrier's own lines, but, even if this were so, it would not follow that the same would be true where the operation was over tracks, already forming part of the interstate system, and, therefore, productive of fuller utilization of that system.

We believe, however, that the thought behind the sentence above quoted was misapprehended. The order there under review was compulsory and not permissive. Any attempt to *require* the carrier to operate into an area for which it had not assumed obligation, by its franchise, would have been unwarranted (*Oregon-Washington R. & Nav. Co.* v. *United States,* 47 Fed. [2nd] 250). With this thought in mind, the remark takes on the character of a prudent and necessary precaution; but in the light of the theory apparently entertained by the Interstate Commerce Commission it would appear as a dictum, since the contention of the carrier, to which it was directed, had already received a satisfactory answer before the Court wrote the sentence beginning with "Furthermore."

4. The case of *I. C. C.* v. *Los Angeles,* 280 U. S. 52, which the Court below says "seems to have approved an order of the Interstate Commerce Commission for the joint use of terminal facilities," arose out of the attempts of the State of California to compel certain carriers to construct a union station in Los Angeles. This would have necessitated the abandonment of certain existing tracks and the construction of certain new tracks. In *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331, it was held that the incidental relocation of these tracks required a certificate from the Interstate Commerce Commission. The City of Los Angeles then asked the Interstate Commerce Commission for an order requiring the three carriers to build a new union station. With this was consolidated an application by the Southern Pacific Company for authority to abandon certain main line tracks and for authority to construct new and to extend existing lines. The Commission held that it had no power to require the construction of a union station. It made a hypothetical certificate to the effect that public convenience and necessity required the extension of lines to reach the union station and permitted the abandonment of certain lines, but denied the application of the Southern Pacific to extend its lines. The City sought mandamus to compel the Commission to consider the question whether it should order the carriers

to build a union station. The Supreme Court of the District of Columbia dismissed the petition. The Court of Appeals reversed the judgment; and this Court reversed the Court of Appeals.

This Court did not approve an order of the Interstate Commerce Commission "for the joint use of terminal facilities." That Commission made no such order. It expressly refused to do so. Trackage rights were not involved in the case.

5. The portion of the opinion in *Alabama Ry* v. *Jackson Ry.*, 271 U. S. 244, 249, invoked by the Court below does not say that the only limitation set by *the Transportation Act* upon the powers conferred upon the Commission is that introduced by paragraph 22 of Section 1. It says that the only limitation upon the broad powers conferred on the Commission *"over the construction, extension and abandonment of the lines of carriers"* is that introduced as Section 1(22). We are confident that this Court did not mean that the Commission possessed over interstate carriers any power it might elect to exercise, except for the one trivial limitation affecting side tracks. Certainly it did not say so.

The *Alabama* case did not involve a trackage right. It dealt solely with a physical connection between two interstate carriers. The remark quoted from that case by the Court below is, we submit, not even a dictum that a trackage right is an "extension" within the meaning of Section 1(18). The Court merely stated what the limitation was on the Commission's power over an "extension," without being called upon, or attempting, to define what an "extension" was. To cite this remark from the *Alabama* case in support of the proposition that a trackage right *does* constitute an "extension" is, we submit, a *petitio principii*.

The reasons given by the Court below for its view that "it is unreasonable to confine them (the words 'extension of its line of railroad' and 'extended line') to cases of the construction, acquisition or maintenance of an extension by an owner" (R. 578) were that the dangers from new construc-

tion and from trackage rights were identical and that courts had already decided that a trackage right was an "extension" within the meaning of Section 1(18). We have shown above that neither of these assumptions has any basis. We submit that, with the failure of support, the view itself falls and that we are brought back to the propositions supported in our Point I, namely, that, by Section 1(18), Congress did not intend to deal with trackage rights, which involve only operating expenses, but intended to control the construction of new lines and extensions and the acquisition of other lines, matters which involve capital charges, increases in the rate base, additional securities, and the creation of superfluous or competing lines.

POINT VIII.

The Court below erred in holding that jurisdiction was properly assumed by the Interstate Commerce Commission, because the Long Island, when running its trains under the proposed trackage agreement, would be preventing an abandonment.

The last of the three separate grounds, on which the Court below sustained the jurisdiction of the Interstate Commerce Commission, had to do with the assumed relation of trackage rights to abandonment. Conclusion of Law 10 was (R. 579):

> "Jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island, when running its trains under the proposed trackage agreement, * * * (3) would be preventing an abandonment, which might occur, if the railroads agreed to discontinue joint use of terminal facilities because of burdensome rulings by the State authorities."

There was no finding by the Commission or by the Court that the State ever had afflicted either carrier with burdensome rulings; and so we assume that this particular item of aggravation was not regarded by the Court as the basic or exclusive reason why Congress desired to prevent abandon-

ment, and that the statute would equally apply where the carriers agreed to terminate their relationship for *any* reason.

The theory expressed in this conclusion of law does not very clearly appear, but may possibly be somewhat clarified by Conclusion of Law 6 (R. 579):

> "Section 1(18) expressly gives jurisdiction to the Interstate Commerce Commission to prevent abandonment and requires a certificate that 'public convenience and necessity permit' abandonment before it can take place. If the Commission has jurisdiction to prevent abandonment in such a case as this, it has the inevitable power to compel continuance and, as incidental to that power, to determine what sort of an agreement is compatible with the interests of interstate commerce."

The issue here is not disposed of by stating the unquestioned fact that the Interstate Commerce Commission has jurisdiction to prevent abandonment. The real question is what is meant by "abandonment." Generally speaking, it means the surrender by a carrier of its franchise—the definite termination of the thing which confers upon it the right, and imposes upon it the obligation, to operate. Appellees urged upon the Court below that "abandonment," as used in Section 1(18), meant also the discontinuance of operation, under trackage rights, over a line owned by another. The Court below did not rule that this was so. It merely said that, *if* this was so, certain conclusions followed. Although the question was definitely presented to it, it did not hold that abandonment "of a line of railroad" embraced also the mere discontinuance of operation under a trackage right.

There is no ground or justification for revising the language of the Court below so as to make positive something which it preferred to leave conditional—to put in the indicative something which it was careful to place in the subjunctive mode. As the Court did not hold that this case

could present an "abandonment," it follows that the consequences named were merely contingent upon a possibility, and so of no value or importance.

Moreover, the Court below had the best reason for refraining from such ruling. That the words "abandon all or any part *of a line of railroad*" refer to the surrender of its own franchises and not to the mere cessation of operation is shown by the fact that Congress, in order to guard against another possibility, found it necessary to add the words "or the operation thereof." Furthermore, assuming that at least one purpose of Section 1(18) was, as the Court below said, to *prevent* abandonment—that is, to guard against the destruction of portions of the interstate system—it is clear that one purpose of the Act was to prevent parts of the interstate transportation system from being rendered wholly inoperative—a result which would not follow from the withdrawal by *one* carrier from the joint use of the lines of another.

There is another reason why Congress did not deal with such disparite things, as abandonment and the cessation of trackage rights, under the same section. That reason is that an attempt to deal with the latter would have involved a constitutional question: Normally, one carrier cannot secure the right to use the tracks of another, except through an agreement with that other carrier. These carriers have a constitutional right to dissolve their agreement at any time they see fit; and, after such dissolution, an attempt by Congress to compel continuance of operation would be an attempt to compel one carrier to submit to the use of its road by another. Congress recognized this when it made, in Section 3(4), its only attempt to compel the use of one carrier's property by another (in that case, terminal property); for there it provided that the compensation should be on such terms "as the carriers affected may agree to" or on terms fixed by the Commission "on the principle controlling compensation in condemnation proceedings."

It is self-evident that, if the Interstate Commerce Commission has jurisdiction to prevent abandonment, it has power to compel continuance. It has power to prevent aban-

donment of franchises, because a carrier has no right to abandon a portion of them, but must operate *in toto* or abandon *in toto*. But in the case of trackage rights, the case is entirely different. There, the carriers do have a right to terminate their relationship, whereupon the user may cease operating or the owner may oust it from occupation. The Commission has power to compel a carrier to continue use of its franchises, but none to compel the use of another's tracks after the contractual right of use has expired.

The Court below expressly said that the power of the Commission "to determine what sort of an agreement is compatible with the interests of interstate commerce" was incidental to the power to compel continuance. As there is no power to compel continuance of trackage rights, there is, of course, no power to dictate an agreement. Even in the case of an order compelling use of a terminal, the Commission cannot fix such terms as it deems "compatible with the interests of interstate commerce," but must fix the compensation "on the principles controlling compensation in condemnation cases."

If we were to assume, however, that the Interstate Commerce Commission did have power to prevent the discontinuance of trackage rights, to compel continuance, and to dictate the terms of agreement, it would seem to us that such power could not be exercised except in a direct proceeding for discontinuance. The present case arose from no such proceeding. No case of discontinuance was presented. We, therefore, submit that there is nothing in the series of hypotheses that tends in the slightest degree to support the contention that the Commission was called upon to dictate or suggest terms and conditions different from those under which the carriers were already operating.

Indeed, all that we can see in this discussion about abandonment is the light which it throws on the meaning of the words "line of railroad." * It would seem that the "line of

* In *New York Dock Co.* v. *Pennsylvania Railroad Co.*, the Pennsylvania Railroad Company proposed, without leave of the Interstate Commerce Commission, to deliver freight by motor truck from its terminals directly to consignees and to receive freight from consignors for delivery by trucks to its terminals. The Dry Dock Railway sought to enjoin it from so doing,

railroad" which the carrier was forbidden to "abandon" was the same sort of line which it was forbidden to "construct," "extend" or "acquire." As the "line of railroad" which it cannot "abandon" is one owned by itself, it would seem to follow that the "line of railroad" which it cannot "construct," "extend" or "acquire" must also be confined to one owned by it.

POINT IX.

This appeal calls merely for the exercise of judicial functions and not for statecraft.

In an interesting article, "Historical Fragments Pertaining to the United States Supreme Court," appearing in the New York Law Journal of September 28, 1932, Vol. 88, No. 75, the Hon. Martin T. Manton, Senior Judge of the United States Circuit Court of Appeals for the Second Circuit, after pointing out that "the Constitution is what the judges say it is, and the Supreme Court is the highest tribunal," and that "the high importance and great significance of the Supreme Court in the political and economic history of the nation lie in the fact that it has not always been merely a judicial tribunal," says:

> "What was revolutionary, though necessary, in our governmental scheme was the power which the court has exercised in interpreting and formulating the doctrines on which the government is founded. In form the exercise of this power has been by way of

on the theory that this terminal service would be an "extension" of the company's "line of railroad," which could not be undertaken without first obtaining a certificate of public convenience and necessity as provided by Section 1(18). The U. S. District Court for the Eastern District of Pennsylvania denied the application for injunction and dismissed the bill. This was affirmed (January 10, 1933) by the Circuit Court of Appeals, Third Circuit. As reported in The United States Daily, January 20, 1933, at page 4, the Appellate Court said:

> "We hold that the proposed accessorial terminal service by trucks is not a 'railroad,' nor is it a 'line of railroad,' nor 'an extension of a line of railroad,' but it is a service of transportation which may be rendered by the defendant railroad company without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity, subject of course to tariffs filed and allowed. The decree of the District Court is affirmed."

> the judicial process of interpretation, but in fact it has been sometimes a process of formulation, of wise and far-sighted judicial legislation, which has overridden the enactments of the legislative department itself."

It may be pointed out that the instant case involves nothing but a question of statutory construction. This Court is not called upon to determine whether, under the Constitution, Congress possesses a certain power claimed to reside in the States, but merely whether, under Section 1(18), Congress intended to, or did, delegate to the Interstate Commerce Commission the power which, in this case, it sought to exercise. Nor is it called upon to decide whether other rights must be subordinated in order that property may flourish. The issue, in short, is not between the Federal Government and the States or between property and other rights, but between the intent of Congress and the will of the Interstate Commerce Commission. We submit, therefore, that this case is not one which requires the exercise of statecraft, but is such as commonly comes before what Judge Manton calls "merely a judicial tribunal."

Before such a body, it is sufficient to refer to the numerous decisions by this Court, some of which are cited in the footnote,* to the effect that where the meaning is clear, there is an end to construction and the statute is to be taken to mean what it says, and that, if the law be deemed to be defective in any respect, the remedy must be applied by Congress and not by the courts. Illustrative of this rule, is *Crooks* v. *Harrelson*, 282 U. S. 55, 60:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape conse-

* *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 85; *Bank* v. *Sherman*, 101 U. S. 403, 406; *Thornley* v. *United States*, 113 U. S. 310, 315; *United States* v. *Union Pacific Railway*, 160 U. S. 1, 35; *White* v. *United States*, 191 U. S. 545, 551; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 295; *American Express Co.* v. *United States*, 212 U. S. 522, 535; *United States* v. *First National Bank*, 234 U. S. 254, 260, 262; *Adams Express Co* v. *Kentucky*, 238 U. S. 190, 199; *Green* v. *Frazier*, 233 U. S. 233, 240; *Chung Fook* v. *White*, 264 U. S. 443, 446.

> quences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson* v. *Chester,* 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts."

The cases cited make it clear that even though it should appear that it would have been practically or politically desirable, if Congress had given the Commission jurisdiction over the use of existing interstate facilities as well as over the construction and acquisition of additional facilities, still this Court will not attempt to correct the omission itself, through its power of construction, but will leave it for Congress to do so, through its power of legislation. If Congress made any mistake, it may be corrected in the proper way, by supplemental legislation.

In saying this, we do not mean to imply that Congress did make any mistake. There were sound reasons for limiting the section to the construction, acquisition and abandonment of lines of railroad. No crying abuse could result from a more intensive use of existing lines. To have required a certificate for every instance of such use would have tended to discourage it or would have imposed a large volume of unnecessary work on a Commission already overburdened.

The principle involved, while vital to those concerned here, can hardly be of such general application as to necessitate a resort to judicial legislation. There cannot be many other cases where the agreement governing the use of a terminal, begun prior to 1920, has "technically expired." This did happen in the case of the Lehigh Valley, which operates into the same terminal (R. 550, 403); but the Interstate

Commerce Commission has not regarded this as important enough to raise the question under Section 1(20). The principle, although of great importance to the Pennsylvania and to the State and involving far-reaching legal implications, would have little practical importance, except in this one case where the Interstate Commerce Commission has elected to stand upon it.

The aim professed by the Commission is to revise the existing terms, which weaken neither the Pennsylvania nor the Long Island, so as to make them precisely as fair to one party as to the other. It undertook to determine just how much more rental should be paid by the smaller, weaker and controlled Long Island to the larger, stronger and independent Pennsylvania in order to produce this equilibrium of equities. This idealistic aim is beyond the scope of the Commission's jurisdiction. Accordingly, the case is not one of those where this Court is obliged to accept as unerring, or, at least, as conclusive, the judgment of the Commission; and there is reason to believe that, in this case, the Commission has not achieved the nice adjustment of equities which it was ambitious to secure. The case, we submit, does not present one of the occasions where the Court invokes its extra-judicial activities.

There is abundant reason to believe that, for legal reasons, the practical effect of upholding this certificate with the condition attached would be far from desirable. The aim of this proceeding is to free the Pennsylvania from the control over the rental now possessed by the State. The Interstate Commerce Commission presumably believed that, by following this practice, control by it would be substituted for control by the State. This, however, is exceedingly doubtful. It involves the assumption that, after making the agreement required as a condition to the issuance of the certificate, the parties will be unable to modify its terms, without the approval of the Commission. It is hard to see how the Commission can thus restrict the right of the parties to contract with each other. Such power is not conferred by statute and cannot be acquired through stipulation of the parties. It is probable that the parties could enjoy the certificate,

while rejecting the condition as unlawful (see *United States* v. *Chicago etc. R. Co.,* 282 U. S. 311, 327, 328, 342). Probably the only effect would be to free the Pennsylvania from *all* control.

Moral factors, so far as they may be inducements to judicial legislation, seem to be lacking. The purpose of the Pennsylvania in seeking to abolish all control over the rental is apparent. As it owns practically all the stock of the Long Island (R. 573), it would gain nothing merely by increasing the rental paid by the Long Island; for as the rental increased, the dividends would *pro tanto* decrease, leaving the total amount received the same as before. An increase in the Long Island rental would, however, increase the operating expenses of the latter and so afford a ground for claiming an increase in the intrastate rates charged by the Long Island. That this is the program of the Pennsylvania is obvious and is proved by the fact that when, in 1923, approval of the increased rental was sought from the Transit Commission, it was deemed necessary, at the same time, to seek for an increase in commutation rates, in order to meet this increase in the rental (R. 342, 574).

Unless the bare possibility of "burdensome rulings" by the State be a reason, there is, we conceive, no other requiring the exercise by a court of other than its purely judicial functions. Every time but one that agreements were submitted to the State authorities they were approved by them. After the approval of agreements in 1912, 1920 and 1922, the rental paid by the Long Island increased from $519,173 in 1911, to $1,660,165 in 1922, and to $1,812,024 in 1923 (R. 574). The application which was not granted was made in 1923. This was not refused absolutely, but was afterwards granted in modified form and was made retroactive to July 1, 1923 (R. 342). Following this, the rental increased from $1,812,024 in 1923, to $2,835,151 in 1928 (R. 577). When application was made to the Interstate Commerce Commission, seeking approval of the maximum rental that had been sought from the Transit Commission in 1923 and in 1925, the Interstate Commerce Commission refused to approve it

(just as the Transit Commission had done), on the ground that it "imposes unreasonable terms upon the Long Island" (R. 355).

The Pennsylvania terminal was constructed to meet the needs and resources of a great interstate trunk line system of 12,000 miles. The maintenance charges, taxes and interest on the investment would be borne entirely by the Pennsylvania, if it did not secure something from the trackage rights granted to other companies. What it receives from the Lehigh Valley and from the New York, New Haven and Hartford does not appear in the printed record. For the partial use of the part used by the Long Island east of Tenth Avenue, Manhattan, it receives substantial sums. The Long Island pays a proportion of the operating expenses, taxes and interest on the investment on each of the three zones into which all the property east of Tenth Avenue, except the station building above the track level, is divided. In 1930, the Long Island paid the following percentages of operating expenses, taxes and interest (R. 575):

Zone	*Percentage*	*Investment*
1	42.08	$46,896,745.94
2	60.49	32,605,521.38
3	7.65	8,625,170.90

It thus appears that the Long Island, a system of about 400 miles, pays very large percentages (which will be increased) of the expenses, taxes and carrying charges on facilities designed for the Pennsylvania, a system of 12,000 miles. This is due to the wheelage basis—a method which bases the rental on the number of car movements. As the Long Island is engaged in suburban traffic, its car movements are much more numerous and rapid than those of the Pennsylvania, which has practically no suburban business in this station, since it diverts this traffic to the downtown station of the Hudson & Manhattan (R. 346, 440). Consequently, the Long Island makes more intensive use of the tracks and moves more cars than the Pennsylvania within the same period.

There is a material difference between the dense suburban traffic of the Long Island, which makes for low unit costs, and the trunk-line traffic of the Pennsylvania, with heavy and comparatively infrequent trains and no surburban service (R. 353). The tendency of the wheelage basis is to transfer this benefit of low unit costs due to this density of operation from the Long Island to the Pennsylvania. The Transit Commission approved the wheelage basis only because the injustice of it was mitigated by omitting all interest, taxes and operating charges in connection with the station building, and further by computing interest at 4 and 4½ per cent. (the amounts originally chosen by the parties themselves) on the investments in the other facilities (R. 349). The Interstate Commerce Commission approved an increase in the rental, by adhering to the wheelage basis and at the same time increasing the interest rate to 5 per cent. (a rate higher than that paid by the Pennsylvania to its lessor) and by requiring the Long Island to pay 20 per cent. of the operating expenses of the station building.

It is not without a sense of our limitations that we have undertaken to consider and discuss the possibilities so clearly expressed by the Senior Judge of the Circuit from which this case comes. Principles of law and the rules of construction lie open to lawyers in the books; but the nature of the law-giving process that goes on above the cloud-line of Sinai must necessarily be a matter of inference and speculation to those who are not initiates. We have, however, grappled with these esoteric aspects as best we might, and have endeavored to show that this case presents merely a question of statutory construction and that there are no circumstances which call for more than the application of the rules of construction which are referred to in our earlier Points.

POINT X.

The decree of the Court below should be reversed and the certificate or order of the Interstate Commerce Commission, adopted February 8, 1932, should be set aside and annulled.

Dated, New York, January 25, 1933.

Respectfully submitted,

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JOHN J. BENNETT, JR.,
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CHARLES ELMORE C

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 535.

TRANSIT COMMISSION AND WILLIAM G. FULLEN, LEON G. GODLEY AND REUBEN L. HASKELL, CONSTITUTING THE TRANSIT COMMISSION, *Appellants*,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY AND THE INTERSTATE COMMERCE COMMISSION, *Appellees*.

STATE OF NEW YORK, *Appellant*,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY AND THE INTERSTATE COMMERCE COMMISSION, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE LONG ISLAND RAILROAD COMPANY.

ALFRED A. GARDNER,
D. P. WILLIAMS,
JOSEPH F. KEANY,
Counsel for Appellees.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 535

TRANSIT COMMISSION and WILLIAM G. FULLEN, LEON G. GODLEY and REUBEN L. HASKELL, constituting the Transit Commission,
Appellants,

AGAINST

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

STATE OF NEW YORK,
Appellant,

AGAINST

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE LONG ISLAND RAILROAD COMPANY.

Opinions Below.

The opinion of the specially constituted District Court is reported *Transit Commission* v. *U. S., et al.,* 1 F. Supp. 595, and will be found also at R. 564.

The Interstate Commerce Commission, Division 4, rendered two opinions, a first Report, March 18, 1930, *Long Island Railroad Company Trackage,* 162 I. C. C. 218, (R. 334) and a supplemental Report, February 8, 1932, *Long Island Railroad Trackage,* 180 I. C. C. 439 (R. 537).

Statement.

This suit was brought under 28 U. S. C. 41 (28), 43-48, to enjoin, set aside, suspend and annul a certificate and order of the Interstate Commerce Commission in a proceeding designated as Finance Docket No. 7308, entered February 8, 1932, whereby that Commission certified under Section 1(18) of the Interstate Commerce Act that the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company, from Sunnyside Yard in the Borough of Queens to and under the East River and the Borough of Manhattan to and in the Pennsylvania Station at 7th Avenue, under trackage rights over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company (Pennsylvania Railroad Company, Lessee) and prescribed the terms of the trackage right agreement for such operation.

Identical petitions filed by the State of New York and by the Transit Commission (constituting the Metropolitan Division of the Department of Public Service of that State)

were consolidated by the District Court (R. 70, 564). The Interstate Commerce Commmission intervened in opposition to both petitions (R. 10, 54).

On June 8th, 1932, upon the application of the Transit Commission and the State an order to show cause was made convening a special court of three judges—the Honorable Augustus N. Hand, United States Circuit Judge, and the Honorable Robert P. Patterson and William Bondy, United States District Judges—and requiring the respondents to show cause before that Court on June 28th, 1932, why the Order of the Interstate Commerce Commission should not be temporarily enjoined (R. 65, 66).

At the hearing held on the order to show cause on June 29th, 1932, all parties rested on the record before the Interstate Commerce Commission and submitted the case for final determination (R. 564, 565).

On October 3rd, 1932, the Court handed down a unanimous opinion holding that the petition should be dismissed on the merits. A final decree to that effect was made and entered October 19th, 1932 (R. 580).

From the decree so entered this appeal was taken pursuant to Sec. 47a, Title 28 of the United States Code (R. 584).

The Question Before This Court.

The sole question before this Court is whether the certificate and order made by the Interstate Commerce Commission are within the Commission's constitutional and statutory authority.

There is no controversy over the facts. As the Court below pointed out in its opinion (R. 568): "It is conceded that public convenience and necessity require the continuance of the use by the Long Island of the Pennsylvania facilities and there is no claim that the findings of fact of the Interstate Commerce Commission were unsupported by the evidence."

The Statute Under Which the Interstate Commerce Commission Acted.

Section 1, paragraphs 18 to 20 and 22 were added to the Interstate Commerce Act by the Transportation Act of 1920. They were in full as follows:

> (18) [After ninety days after this paragraph takes effect] no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation, thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> [The words in brackets *supra* omitted in subsequent codification U. S. C. Title 49.]

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any

court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The railroad companies in making their application to the Interstate Commerce Commission invoked not only Section 1(18) but Section 3(4) which deals with terminals and in full is as follows:

§3(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier by another carrier or other carriers, on such terms and for such compensation as the

carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

The Interstate Commerce Commission took the view that it had ample authority under Section 1(18) that there was no necessity for applying Section 3(4) even if that Section were applicable.

In retaining jurisdiction under Section 1(18) the Commission said (162 I. C. C. at p. 220):

> "The granting of authority for the applicants' proposal under section 1(18) is both necessary and appropriate, and there is no sound reason preventing the assumption of jurisdiction by us under this part of the act, even though joint operation began prior to the effective date of the transportation act, 1920, and has been continuous. As to Section 3(4), which pro-

vides for the compulsory opening of one carrier's terminal facilities to another carrier when the public interest requires such use, there is nothing in the situation here presented which brings it within the terms of that paragraph. By voluntary arrangements between the parties the Long Island has been using the tunnel, yard, and terminal facilities provided for it by the Pennsylvania in New York since September 8, 1910. There is no suggestion that the Pennsylvania intends to discontinue this privilege. The question of compensation is indeed at issue, but contrary to the applicants' understanding of the force of this fact, associated as it is with the close corporate relationship between the companies, the applicability of section 3(4) does not appear. Accordingly, the fixing of compensation as therein provided on the principle controlling compensation in condemnation proceedings, may be disregarded. That part of the application which is under section 3(4) will therefore be dismissed. The reasonableness of a joint facility rental is in general a matter of public interest, as well as a matter which may affect the operations of the carriers in interstate commerce, and should be considered by us in reaching a finding of public convenience and necessity. Thus, the financial as well as the transportation features of the present application may be fully recognized and dealt with under the authority conferred by section 1(18). In cases of extensions of operations under trackage rights the cost of the applicant companies is not less important than in cases of extension by construction, acquisition, or lease. A motion to dismiss the application on the ground of lack of jurisdiction was properly denied."

The New York State Statute.

Section 148 of the Railroad Law of the State of New York contains the following provisions:

> "Subject to the permission and approval of the public service commission, any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. * * *"

Proceedings Before the Interstate Commerce Commission.

The application for the certificate of convenience and necessity was filed by the railroad companies December 13th, 1928 (R. 335, 72, 79). Part of the application was a proposed joint facility trackage agreement.

The Commission sent the application to an Examiner who held hearings and proposed a report (R. 334) in which he recommended:

> "(1) That the commission find that the present and future public convenience and necessity require the operation by the Long Island under trackage rights over the railroad of the Terminal Company as described in the application, but that the terms of the proposed agreement dated November 13, 1928, attached to the application, are inequitable, (2) that the issue of a certificate of public convenience and necessity be deferred until an agreement shall have been submitted to the commission, the terms of which are found to be fair and reasonable, and (3) that the part of the application which is for an order under section 3(4) be dismissed."

Exceptions having been filed to the Examiner's report by all the parties the Commission, Division 4, denied the railroad companies' application under Section 1(18) without prejudice to the submission of a modified contract and dismissed the application for an order under Section 3(4) (R. 356).

The railroad companies, having on December 27th, 1930, presented a revised contract (R. 357), the Commission again referred the application to the Examiner who again found the terms of the proposed contract unsatisfactory (R. 528). Exceptions were filed to his proposed report by all the parties. The Commission, Division 4, having heard arguments on the exceptions made a report (R. 538), and issued a certificate and order certifying that the public convenience and necessity required the continued operation under trackage rights as proposed, provided specific changes should be made in the terms and conditions of the contract which the carriers had last presented.

The certificate and order in full are as follows (180 I. C. C. at p. 447; R. 547):

CERTIFICATE AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 8th day of February, A. D. 1932.

Finance Docket No. 7308

LONG ISLAND R. CO. TRACKAGE

Hearings and investigation of the matters and things involved in this proceeding having been had,

and said division having, on March 18, 1930, and on the above date, made and filed reports containing its findings of fact and conclusions thereon, which reports are hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue in Sunnyside yard, and the Pennsylvania station, New York, N. Y., including the joint use of said yard, station, and appurtenant facilities described in the record, under the terms and conditions of the proposed joint operating agreement dated December 23, 1930; *Provided, however,* and this certificate is issued upon the express condition, that said terms and conditions be modified in the respects and to the extent indicated in the accompanying report, to wit: In ascertaining currently the rental payable, additions and betterments to the Pennsylvania station building and service plant made subsequent to July 1, 1928, shall be excluded; the term of the aforesaid agreement shall be five years, with provisions for its extension from year to year unless terminated by at least six months' notice by either party to the other; Article VI of the proposed contract shall be omitted; the rate of interest to be applied on the investment cost of all jointly used property and facilities, according to the provisions of said agreement which are not otherwise affected by the changes herein prescribed, shall be 5 per cent per annum; and, the joint accounts of the parties shall be credited currently with all revenues from rents, privileges, and concessions within zones 2 and 3.

IT IS ORDERED, That, if within 60 days from the date hereof, The Long Island Railroad Company and The Pennsylvania Railroad Company shall jointly file with this commission written notice of the acceptance by them of the foregoing conditions, this certificate shall take effect and be in force from and after 30 days from the filing of said acceptance, and in such event the said carriers, within 30 days from the date of such acceptance, shall file with this commission duly verified copies of the joint operating agreement as modified in accordance with said conditions and executed.

By the commission, division 4.

GEORGE B. MCGINTY,
Secretary.

The Report of March 18th, 1930, referred to in and made part of the Certificate will be found at 162 I. C. C. 218 and the Report of February 8, 1932, also referred to in and made part of the Certificate will be found at 180 I. C. C. 446.

The railroad companies accepted the conditions, modified the joint operating agreement and executed and duly filed copies thereof in accordance with the Certificate and Order. The agreement as thus modified, accepted and filed will be found at R. 551.

The Transit Commission moved for a reargument or rehearing. The Interstate Commerce Commission denied the motion (R. 563).

Description of the Joint Facility and the Successive Trackage Agreements Prior to the One Which was Approved by the Certificate and Order here in Controversy.

The Pennsylvania Railroad Company and the Long Island Railroad Company are common carriers each engaged in interstate Commerce.

Part of the Pennsylvania Railroad Company's plan for extending its passenger service into the Borough of Manhattan, City of New York, by tunnels under the Hudson River from New Jersey, was also to extend the passenger service of the Long Island Railroad Company into Manhattan by tunnels from Long Island under the East River and to build a joint terminal station in the Borough of Manhattan for the passengers of both (R. 108, 154). The plan was consummated. The Pennsylvania Station was built. It was opened Sept. 8, 1910 (R. 107).

The Long Island Railroad Company has been operating into the Pennsylvania Station, New York City, since 1910 when the terminal was opened (Finding No. 1, R. 573). Its service was extended from Long Island under the East River and into the station in September of that year and was continued under successive trackage agreements approved by the Transit Commission of the State of New York (R. 95, 566, *et seq.*). The term of the last of the trackage agreements expired in 1927 (Finding No. 20, R. 577).

The corporate medium by which the terminal was established was the Pennsylvania Tunnel & Terminal Railroad Company, successor to The Pennsylvania, New York and

Long Island Railroad Company and The Pennsylvania, New York and New Jersey Railroad Company (R. 199). Its properties extend from Kearney, in Hudson County, in the State of New Jersey to Sunnyside, in the Borough of Queens, City and State of New York, and include a continuous railroad route across the meadows in New Jersey, under the Hudson River, under Manhattan Island and through the Pennsylvania Station, and under the East River with terminal yards in Manhattan and in the Borough of Queens, the yard in Queens being known as Sunnyside Yard (R. 73).

The portion of the terminal properties used as a joint facility by the Long Island comprises the Pennsylvania Station, the yards below the surface under and adjacent to the station site, the tunnels eastwardly under Manhattan Island and the East River to the Borough of Queens and the Sunnyside Yard (R. 551, *et seq.*).

The Pennsylvania Tunnel & Terminal Railroad Company's stock is all owned by the Pennsylvania Railroad Company. Its properties are all leased to and operated by the Pennsylvania Railroad Company, under lease dated June 14, 1928, and approved by the Interstate Commerce Commission, 145 I. C. C. 283 (Finding No. 2, R. 573).

The Pennsylvania Railroad Company owns all but a few shares of the stock of the Long Island Railroad Company (Finding No. 2, R. 573). But there is no lease; the Long Island operates its own railroad.

Upon the completion of the Pennsylvania Station and Terminal in 1910, the Long Island began to operate over the tracks of the Pennsylvania into the latter's station under a trackage agreement, for which the carriers sought

and obtained the necessary permission and approval of the Public Service Commission of the First District of the State of New York. This agreement was modified by another dated June 24, 1912, and the rental payable by the Long Island was, in 1920, and again in 1922, increased with the approval of the Public Service Commission and (after 1921), of its successor, the Transit Commission (Finding No. 3, R. 573, 574).

In 1923 the carriers made application to the Transit Commission for the approval of an amendment to the then existing trackage agreement, which involved a further increase of the rental payable by the Long Island. Under the terms of the existing agreement, the Long Island was paying to the Pennsylvania, as rental, a share of the operating expenses and taxes (less net revenue from station privileges) on the jointly used facilities east of Tenth Avenue, Manhattan, including the station building, and, in addition, a fixed sum of $300,000 per annum. The amendment proposed in 1923 required that the Long Island share on a wheelage basis in the interest at 4 per cent. on the investment in the jointly used facilities and in the station building, instead of paying the lump sum of $300,000 as before. This amendment was disapproved by the Transit Commission. (Findings Nos. 4 and 5, R. 574.)

In March, 1925, another application to the Transit Commission was made for approval of a trackage agreement similar to the one rejected, except that this application eliminated from the investment base the sum of $15,000,000 representing the cost of the station building above the track level, and increased the share in the interest from 4 to 5 per cent. This proposed agreement was disapproved by

the Transit Commission in May, 1925, but on July 28, 1925, approved upon a reduction of the interest rate by the carriers to 4 per cent. In November, 1925, a further application was made to the Transit Commission to approve an increase of the rate to 6 per cent. This was disallowed in December, 1925, but an extension of the agreement as approved July 28, 1925, was granted for one year from January 1, 1926. (Finding No. 11, R. 575, 576.)

The last extension by the Transit Commission of the agreement approved July 28, 1925 having expired, the railroad companies filed their application with the Interstate Commerce Commission on December 13th, 1928, as hereinabove set forth, thus instituting the proceedings which led to the certificate and order here in controversy.

The terms first proposed to the Interstate Commerce Commission were that the Long Island should pay on a wheelage basis not only its proportionate share of operating and maintenance charges but also its share of a return on the cost of the joint facility including the station building at 6% (R. 79, 105, 106).

After the disapproval of that proposal without prejudice the companies presented another agreement (R. 357, *et seq.*) which eliminated from the investment base $15,000,000 representing the Station Building above the track level, required the Long Island to pay 20 per cent of the operating expenses of that building and reduced the rate of interest to be computed on investment from 6 to 5¾ per cent. On February 8, 1932, the Interstate Commerce Commission granted the certificate of public convenience and necessity, upon condition that the terms of the agreement so proposed be modified. The condition was accepted and the agree-

ment modified, executed and filed all as hereinabove set forth (p. 12).

The Appellants in their brief (pp. 75-77) call attention to the increases in rental payments under the successive trackage agreements and to facts which seem to convey that the implications that the terms of the agreement impose an unreasonable burden on the Long Island.

The question of the reasonableness of the terms of the new agreement is not before the Court here. Since the amount of the rental payments has been referred to however it is not out of place, we believe, to call attention to the great and increasing use of the joint facility by the Long Island Railroad Company and the tremendous value of it as furnishing a passenger terminal to that Company in the Borough of Manhattan.

As a result of obtaining a direct all-rail route under the East River and a terminal in Manhattan the Long Island Railroad was no longer dependent on ferries (R. 93). Its business grew rapidly. In 1927 it reached a dividend-paying basis after having paid no dividend since 1896.

The growth of the Company's business and its increasing use of the terminal are shown by Exhibits 15, 16, 7 and 8 (R. 142, 142a, 140, 141). The passenger business grew from 27,500,000 passengers in 1909, the last full year before the opening of the Pennsylvania Station, to 112,500,000 in 1928. The freight business increased from 3,600,000 tons in 1909 to 9,000,000 tons in 1928. The investment in road and equipment in 1909 was $58,700,000 and in 1928 $131,700,000. The gross revenues in 1909 were $10,200,000 and in 1928 $30,500,000. There was no net income and in fact there was a slight deficit of $22,000

in 1909, while in 1928 the net income was $4,700,000. The corporate deficit of $3,400,000 in 1909, which increased by 1915 to over $7,000,000 was changed by 1928 to a corporate surplus of $9,700,000. In 1911, the first full year of operation into the Pennsylvania Station, the Long Island carried 6,200,000 passengers in and out of the station; the number of cars and locomotives was (each locomotive counted as three cars) 228,000. In 1928 the number of Long Island passengers in and out of the station had increased to 48,500,000 and the number of cars and locomotives to 1,370,000.

Summary of Argument.

I. The jurisdiction of the Interstate Commerce Commission over extensions and abandonments, Section 1(18), and the use of terminals, Section 3(4), is exclusive. This has been established and reiterated in a great number of cases, notably in *Dayton-Goose Creek Ry. Co.* v. *The United States, et al.*, 263 U. S. 456; *Colorado* v. *U. S.*, 271 U. S. 153; *Transit Commission et al.* v. *United States, et al.*, 284 U. S. 360.

II. The operation by one railroad company beyond its chartered route over the line of another railroad company by a joint facility trackage agreement is an extension within the requirements of Section 1(18).

The language of Section 1(18) clearly applies not only to construction of new trackage by a carrier in extension of its routes but to operation beyond its chartered routes by trackage agreement over the tracks of another carrier. Plainly the intent was to prevent a carrier from

operating beyond its chartered routes either over a branch or extension it might construct and own or over any line of railroad by whomsoever constructed or by whomsoever owned.

The purpose and purview of the broadened jurisdiction conferred by the Transportation Act amendments of 1920 upon the Interstate Commerce Commission demand such construction of the statute. If the restriction were construed as applicable only to extensions of operation by construction or acquisition of new line to be used only by the carrier and as not applicable to extensions by operation over tracks of another carrier by joint facility user, the purpose of the enlarged jurisdiction of the Interstate Commerce Commission would be defeated. Carriers by joint facility agreements could extend operation beyond their own chartered routes *ad libitum* entirely free from the supervision and restraint of the Interstate Commerce Commission. The reasons why the extension of operation should be limited and scrutinized and certified as necessary apply quite as much to operation by joint facility use if tracks of another carrier as to operation by new tracks built and owned.

The Interstate Commerce Commission in a multitude of cases, including the case here under review, has construed Section 1(18) as applicable to extension of operation by trackage agreement.

The continued assumption of jurisdiction and the practical construction placed upon the statute by the administrative body empowered to enforce it while not conclusive is entitled to great weight, see *Boston & Maine Rd.* v. *Hooker*, 233 U. S. 97, 118; *Texas & Pacific Ry. Co. Abilene Cotton Oil Co.*, 204 U. S. 426; *Logan* v. *Davis*, 233 U. S. at

627; *N. Y. Central Securities Corp.* v. *U. S.*, 54 F. (2) at 126.

This Court construed Section 1(18) as applicable to extensions by way of trackage rights in the Los Angeles Terminal Cases—*R. R. Comm.* v. *Southern Pacific Co.*, 264 U. S. 331; *I. C. C.* v. *Los Angeles*, 280 U. S. 52; *Atchison Ry.* v. *R. R. Comm.*, 283 U. S. 380.

III. The provisions of Section 1(18) apply to the continuance of an operation begun prior to 1920.

The fact that the Transit Commission had jurisdiction prior to 1920 over the joint facility trackage use and had exercised such jurisdiction did not suspend the operation of Section 1(18) and continue the jurisdiction of the Transit Commission.

The approval of the successive agreements by the Transit Commission and its predecessor, the Public Service Commission, was required because under the New York State statute a carrier could use the tracks of another carrier only with the approval of the State Commission (Sec. 148, Railroad Law) and as a condition of granting such approval the State Commission could specify the rental terms and conditions.

It is obvious that after the Transportation Act of 1920 had added Section 1(18) to the Interstate Commerce Act the State Commission could not compel abandonment of operation or specify the terms upon which it would permit operation to continue. The Transit Commission's power to authorize one interstate carrier to use the tracks of another jointly with the owning company was completely gone. And with it went the power to prescribe trackage

rental terms. Such power would exist as a necessary and inseparable part of the general and unlimited power granted the Interstate Commerce Commission even if not specified in terms by the granting statute. But the granting statute was specific. By Section 1(20) of the Interstate Commerce Act the Commission is given power when issuing a certificate of convenience and necessity to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

ARGUMENT.

I.

The jurisdiction of the Interstate Commerce Commission over extensions and abandonments, Section 1(18), and the use of terminals, Section 3(4), is exclusive.

Dayton-Goose Creek Ry. Co. v. *The United States, et al.*, 263 U. S. 456

Colorado v. *U. S.*, 271 U. S. 153

Transit Commission et al. v. *United States, et al.*, 284 U. S. 360

R. R. Comm. v. *Southern Pacific Co.*, 264 U. S. 331; 280 U. S. 52; 283 U. S. 380, (Los Angeles Terminal Cases)

Alabama Ry. Co. v. *Jackson Ry.*, 271 U. S. 244, 249, 250

Texas & Pacific Ry. v. *Gulf Ry.* 270 U. S. 266

Southern Ry. Co. v. *Shealy, et al.*, 18 F (2) 784

M. K. T. R. Co. v. *Northern Oklahoma Rys.*, 25 F(2) 689

El Dorado & W. Ry. Co. v. *Chicago, R. I. & P. Ry. Co.*, 5 F (2) 777

People v. *P. S. C.*, 233 N. Y. 113

Erie Barge Canal Cases, U. S. v. *N. Y. C. R. R.*, 272 U. S. 457, 464; *People ex rel. N. Y. C.* v. *P. S. C.*, 198 A. D. 436, affirmed without opinion 232 N. Y. 606.

Mr. Chief Justice Taft, writing in 1924 about the general scope and purpose of the Transportation Act of 1920 said for a unanimous court in a passage frequently quoted, *Dayton-Goose Creek Ry. Co.* v. *United States et al.*, 263 U. S. 456 at p. 478:

> "The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

A specific and exhaustive examination of the provisions for extensions and abandonments was made in *Colorado* v. *U. S., et al.*, 271 U. S. 153. Mr. Justice Brandeis, writing for a unanimous court set forth at length the reasons why the statute was exclusive and why it was no violation of the rights of the state. The particular case before the court involved an abandonment but the reasoning of the opinion in discussing the rights of the state is equally applicable to an extension.

The opinion summarized the contentions of the State in

the *Colorado Case* and pointed out their fallacy as follows (p. 161 *et seq.*):

> "*First.* The main contention of the State is that the Commission lacks power to authorize the Company to abandon, as respects intrastate traffic, a part of its line lying wholly within the State. The argument is this. While a railroad cannot, in the absence of express statutory provision or contract, be compelled by a State to continue operating its lines at a loss when there is no reasonable prospect of future profit, and may therefore, without such consent, abandon all lines within the State, *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396; *Bullock* v. *Florida,* 254 U. S. 513, 520; *Railroad Commission* v. *Eastern Texas R. R. Co.,* 264 U. S. 79, 85; it has no right to abandon a part of the lines, merely because operation will be attended by pecuniary loss, and still continue to enjoy the privilege of operating other parts within the State; *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission,* 242 U. S. 603; *Fort Smith Light & Traction Co.* v. *Bourland,* 267 U. S. 330. The charter of the Colorado & Southern is a contract with the State. By accepting the charter, the Company assumed the obligation of providing intrastate service on every part of its line within the State, *Colorado & Southern Ry.* v. *Railroad Commission,* 54 Colo. 64, 92-3. The extent and character of this service is subject to regulation by the State. The inherent power of a State to regulate intrastate traffic by requiring the railroad to operate every part of its line, like its power to order a particular service, is, of course, subject to the limitation that the order must not be unreasonable. But the fact that operation of the branch will necessarily result in financial loss, would, in no event, be more than an

important circumstance bearing upon the reasonableness of the State's order requiring the service. In the case at bar no question of the reasonableness of the State's action can arise, because the State has not issued any order; it has merely protested against the Commission's releasing this Colorado corporation from the primary duty voluntarily assumed of maintaining some service on the branch. This, the Commission cannot do as respects intrastate commerce. Transportation Act, 1920, did not purport to take from the State its powers to control intrastate commerce. Nor did it confer upon the Commission power to release a corporation chartered by the State from its primary obligation to furnish service. If par. 18 of Section 1 should be construed as authorizing the Commission to do so without the consent of the State, the provision would be unconstitutional. Compare *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217. Such is the argument."

Having so summarized the contentions of the State the opinion showed their unsoundness as follows:

"The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local

interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be affected by continued operation of an intrastate branch in intrastate commerce at a large loss.

The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishs intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318; or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad*

Commission v. *Southern Pacific Co.*, 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Sante Fe Ry. Co.*, 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in the essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control.

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not, in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern Ry. Co.* v. *United States*, 222 U. S. 20, *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 293. It expressly excluded from federal control that part of the railroad which consists of 'spur, industrial, team, switching or side tracks located . . . wholly within one State.' See *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, *supra*. But as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment.

Recognition of the effect upon interstate commerce of the use of the same instrumentality in intrastate commerce is manifested also in other provisions of Transportation Act, 1920. It is a reason for the exclusive jurisdiction conferred upon the Commission by Section 20a over the issuance of securities. Compare *Venner* v. *Michigan Central R. R. Co., ante,* p. 127. It is the ground upon which the validity of the recapture clause, as applied to surplus profits derived from intrastate operations, was sustained in *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 485. It is the justification for those provisions of the Interstate Commerce Act which require carriers engaged in both intrastate and interstate commerce to render accounts of all their business. *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194. And upon it rests likewise the power exerted by this Court setting aside the state regulations involved in *Union Pacific R. R. Co.* v. *Public Service Commission,* 248 U. S. 67, and *St. Louis & San Francisco Ry. Co.* v. *Public Service Commission,* 254 U. S. 535. See also *United States* v. *Ferger,* 250 U. S. 199; *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1.

The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare *Railroad Commission* v. *Eastern Texas R. R.*

Co., 264 U. S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York* v. *United States,* 257 U. S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

In *Transit Commission, et al.* v. *U. S. et al.,* 284 U. S. 360, the State of New York and the Transit Commission, notwithstanding what the Court had said in the *Colorado Case,* strenuously fought against the doctrine of the exclusiveness of Section 1(18). The Court said, all concurring:

"It [the Interstate Commerce Commission] followed the course outlined in *Colorado* v. *United States, supra,* and the claim that its action was beyond its authority and without warrant of law cannot be sustained. That decision required a holding that appellant's assertion of unconstitutional invasion of the State's sovereignty is without merit. We need not elaborate what was there said on the subject (271 U. S. 165)."

In the *Los Angeles Terminal Cases*, 264 U. S. 331; 280 U. S. 52; and 283 U. S. 380, discussed at length hereinafter, the Court held as will be seen that while the state could in proper case compel the construction of a joint terminal the Interstate Commerce Commission had because of Section 1(18) exclusive jurisdiction over the *extensions* and abandonments necessary in order to permit the joint users to carry their lines into the joint terminal.

II.

The operation by one railroad company beyond its chartered route over the line of another railroad company by a joint facility trackage agreement is an extension within the requirements of Section 1(18).

1. The language of Section 1(18) clearly applies not only to construction of new trackage by a carrier in extension of its routes but to operation beyond its chartered routes by trackage agreement over the tracks of another carrier. The wording of Section 1(18) as the statute was enacted in 1920, is as follows (italics ours):

> "After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire *or operate any line of railroad, or extension thereof*, or *shall engage in transportation* under this Act over or by *means of such additional or extended line of railroad*, unless and until there shall first have been obtained from the Commission a certificate that the pres-

ent or future public convenience and necessity require or will require the *construction, or operation, or construction and operation,* of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Plainly the intent was to prevent a carrier from operating beyond its chartered routes either over a branch or extension it might construct and own or over any line of railroad by whomsoever constructed or by whomsoever owned. The prohibition is against constructing or acquiring or operating. The certificate must be to the effect that the present or future public convenience and necessity require or will require (a) "construction" or (b) "operation" or (c) "construction and operation".

2. The purpose and purview of the broadened jurisdiction conferred by the Transportation Act amendments of 1920 to the Interstate Commerce Act demand such construction of the statute. If the restriction were construed as applicable only to extensions of operation by construction or acquisition of new line to be used only by the carrier and as not applicable to extensions by operation over tracks of another carrier by joint facility user, the purpose of the enlarged jurisdiction of the Interstate Commerce Commission would be defeated. Carriers by joint facility agreements could extend operation beyond their own chartered routes *ad libitum* entirely free from the supervision

and restraint of the Interstate Commerce Commission. The reasons why the extension of operation should be limited and scrutinized and certified as necessary apply quite as much to operation by joint facility use of tracks of another carrier as to operation by new tracks built and owned.

The Interstate Commerce Commission aptly said in a passage already quoted hereinabove (p. 7):

> "The reasonableness of a joint facility rental is in general a matter of public interest, as well as a matter which may affect the operations of the carriers in interstate commerce, and should be considered by us in reaching a finding of public convenience and necessity. Thus, the financial as well as the transportation features of the present application may be fully recognized and dealt with under the authority conferred by section 1(18). In cases of extensions of operations under trackage rights the cost of the applicant companies is not less important than in cases of extension by construction, acquisition, or lease."

3. The Interstate Commerce Commission in a multitude of cases, including the case here under review, has construed Section 1(18) as applicable to extension of operation by trackage agreement.

Missouri - Kansas-Texas Reorganization, 76 I. C. C. 84

Operation of Line by Superior & Southeastern Ry., 86 I. C. C. 403

Fort Worth & D. C. Ry.-C., R. I. & G. Ry., Trackage Rights, 99 I. C. C. 73, 76

Operation of Line by G. M. & N. R. R. Co., 111 I. C. C. 583

Operation by G. M. & N. R. R., 124 I. C. C. 641

Chicago & Alton R. R. Co. v. *T. P. & W. Ry. Co.*, 146 I. C. C. 171, and see the cases cited in the footnote at page 181.

Such an extension may and frequently does comprise or include a terminal and terminal approaches.

Fort Worth & D. C. Ry.-C., R. I. & G. Ry. Trackage Rights, supra

Operation of Line by Kansas City Southern Ry., 99 I. C. C. 777

See reference to terminals at Denver and Colorado Springs, in *Abandonment by C. R. I. & P. Ry. Co.*, 131 I. C. C. 421, at page 429

Operation under Trackage Rights by Baltimore & Ohio, 138 I. C. C. 171

Construction of Union Passenger Station and Equipment Terminal by Cincinnati Union Terminal Co., 138 I. C. C. 297

Control of L. & J. Bridge & R. R., 145 I. C. C. 131

Chicago & Alton R. R. Co. v. *T. P. & W. Ry. Co., supra.*

The Los Angeles Terminal Cases discussed in subdivision 4 immediately following.

The continued assumption of jurisdiction and the practical construction placed upon the statute by the administrative body empowered to enforce it while not conclusive is entitled to great weight, see *Boston & Maine Rd.* v. *Hooker*, 233 U. S. 97, 118; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Logan* v. *Davis*

233 U. S. at 627; *N. Y. Central Securities Corp.* v. *U. S.*, 54 F(2) at 126.

4. This Court construed Section 1(18) as applicable to extensions by way of trackage rights in the Los Angeles Terminal Cases—*R. R. Comm.* v. *Southern Pacific Co.*, 264 U. S. 331; *I. C. C.* v. *Los Angeles*, 280 U. S. 52; *Atchison Ry.* v. *R. R. Comm.*, 283 U. S. 380.

In those cases it was held that the Interstate Commerce Commission had no jurisdiction to compel the construction of a joint terminal for several railroads in Los Angeles; that the California State Railroad Commission did have such jurisdiction; but with respect to the extensions, abandonments and the rearrangement of tracks necessary for the establishment of the terminal the Interstate Commerce Commission had jurisdiction; that is to say, the State could compel the terminal provided the Interstate Commerce Commission certified that convenience and necessity permitted the extensions and changes in the approaching tracks.

It is plain from the opinions in these cases that throughout the controversy this Court as well as the Interstate Commerce Commission treated operation by joint facility trackage agreement as an extension under Section 1(18). The Interstate Commerce Commission first made a Report (100 I. C. C. 421), July 6, 1925. It made a further examination and Report (142 I. C. C. 489), May 8th, 1928. In the latter Report the Commission said at page 497:

> "Reexamination of the whole subject again leads us to the conclusion that under existing law we are not empowered to require the construction of a union pas-

senger station of the character sought by the complaint; but that we are authorized to find (1) whether the present or future public convenience and necessity permits of the proposed abandonment of line, (2) whether the proposed extensions of line are reasonably required in the interest of public convenience and necessity, and whether the expenses involved therein will impair the ability of defendants to perform their duties to the public, and (3) whether such joint use of existing terminal facilities by other than the owning carriers, as would be necessary if a new passenger station were established in the Plaza area, is in the public interest and practicable, without substantially impairing the ability of the owning carrier to handle its own business. These are the conclusions which we reached upon the original presentation."

The findings made upon the earlier examination (100 I. C. C. 459) were adopted finally in the later decision and are reprinted as a footnote at pages 491-492 of 142 I. C. C. Finding 6 is as follows:

"'6. That the use by any defendant steam carriers of so much of the terminal main-line track or tracks of any of the other defendant steam carriers in the city of Los Angeles, Calif., as may be incidental, and necessary or convenient, to the proper operation of any such union passenger station and terminal as defendants or any of them, in accordance with a lawful order of the Railroad Commission of California, may construct and establish in that portion of said city described in paragraph 3 above, is in the public interest and is practicable, without substantially impairing the ability of the carrier or carriers owning or entitled to the enjoyment of such track or tracks to handle its or their own business.'"

In *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, Mr. Chief Justice Hughes at the opening of his opinion (pp. 386-387) summarized the proceedings leading up to the decision in 100 I. C. C. 421 and commented on the decision as follows:

> "These are appeals from judgments of the Supreme Court of California, which affirmed an order of the Railroad Commission of that State requiring the appellants to construct a union passenger station in the City of Los Angeles, together with incidental connections, extensions, improvements and terminal facilities, in substantial compliance with the plan outlined by the Commission. 209 Cal. 460; 288 Pac. 775.
>
> Proceedings were begun before the State Railroad Commission in the year 1916, and in December, 1921, after two hearings, the Railway Companies were required to remove certain grade crossings and to build a union terminal within a defined area known as the Plaza site in Los Angeles. 19 Op. R. R. Com. Cal. 740; 20 *id.* 937. The Supreme Court of the State held that the order was beyond the power of the Commission, because the subject matter had been committed to the Interstate Commerce Commission by the Transportation Act of 1920. 190 Cal. 214; 211 Pac. 460. The judgment was affirmed by this Court. 264 U. S. 331. The Court held that the relocation of tracks, which was incidental to the proposed union station, required a certificate of approval of the Interstate Commerce Commission under paragraphs 18 to 21 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (41 Stat. 476-478), as a condition precedent to the validity of any action by the carriers or of any order by the State Railroad

Commission. (Footnote—See *Interstate Commerce Commission* v. *U. S. ex rel Los Angeles,* 280 U. S. 52, 61.)

Pending the consideration of that case, a proceeding was instituted before the Interstate Commerce Commission by the City of Los Angeles to obtain an order requiring the three Railway Companies to build the union station at the designated place. That Commission decided, July 6, 1925 (100 I. C. C. 421), that it was without authority to require the construction of the station. But, in order to facilitate the disposition of the case, the Commission made certain hypothetical certificates substantially as follows: (Footnote —*I. C. C.* v. *U. S. supra,* pp. 62, 63.)

'(1) That the public convenience and necessity require the extensions of lines that may be necessary to reach and serve any union passenger station within the plaza which may be constructed in accordance with a lawful order of the State Commission and that may be necessary to provide for the incidental rearrangement of passenger and freight routes, and that the expense involved will not impair the carriers' ability to perform their duties to the public. (2) That public convenience and necessity permit the abandonment of train service on Alameda Street and such other abandonments of lines as would be necessary in connection with the establishment of any such station, so lawfully ordered by the State Commission. The report further found that such joint use of track or other terminal facilities as may be incidental and necessary to the proper operation of any such union station is in the public interest and is practicable, without substantially impairing the owning carriers' ability to handle their own business.' "

It will be noted that the last sentence in the foregoing excerpt recognized the applicability of Section 1(18) to joint facility extensions and that the sentence quoted was from the opinion by Mr. Chief Justice Taft in 280 U. S. at pages 61, 62, 63.

After reciting intervening steps Mr. Chief Justice Hughes continues in his opinion at page 389:

> "Petitions for final order were then presented by the City of Los Angeles and the State Commission to the Interstate Commerce Commission. After further hearing the latter Commission made its report, on May 8, 1928, adhering to the conclusions of its former report that 'public convenience and necessity' required the extension by the Railway Companies of their respective main lines in the City of Los Angeles 'so as to reach and serve a union passenger station and terminal which they may construct in the Plaza district', pursuant to order of the State Commission to that effect, with 'the abandonment of other portions of main lines to provide for incidental rearrangement of routes, and the abandonment of train service on Alameda Street' and that 'such joint use is in the public interest and practicable, without impairing the ability of the carrier or carriers owning or entitled to the enjoyment of such track or tracks to handle its or their own business.' The Interstate Commerce Commission issued its certificate accordingly, but the petition for the issue of an order requiring the Railway Companies to construct a union station was denied. 142 I. C. C. 489."

It will be noted that the opinion again refers to joint use of tracks as coming within 1(18).

III.

The provisions of Section 1(18) apply to the continuance of an operation begun prior to 1920.

The fact that the Transit Commission had jurisdiction prior to 1920 over the joint facility trackage use and had exercised such jurisdiction did not suspend the operation of Section 1(18) and continue the jurisdiction of the Transit Commission.

The approval of the successive agreements by the Transit Commission and its predecessor, the Public Service Commission, was required because under the New York State statute a carrier could use the tracks of another carrier only with the approval of the State Commission (Sec. 148, Railroad Law) and as a condition of granting such approval the State Commission could specify the rental terms and conditions.

The successive agreements were for limited periods of time. As pointed out in both Reports the last of the trackage agreements expired with the year 1926 (162 I. C. C. at p. 220, 180 I. C. C. at p. 439).

An existing trackage contract (whatever the rights between the parties might be, compare *Central New England R. Co.* v. *B. & A. R. Co.*, 279 U. S. 415, at 419-420, and *Western Pacific R. Co.* v. *Nevada-California-Oregon R.*, 40 F (2) at 733), could not stand in the way of the exercise of the Interstate Commerce Commission's exclusive jurisdiction over extensions and abandonments. All existing contracts must yield to the paramount power of Congress over interstate commerce. Suffice to say however that in

this case now before the Court there was no existing trackage agreement when the railroad companies went to the Interstate Commerce Commission.

It is obvious that after the Transportation Act of 1920 had added Section 1(18) to the Interstate Commerce Act the State Commission could not compel abandonment of operation or specify the terms upon which it would permit operation to continue. The Transit Commission's power to authorize one interstate carrier to use the tracks of another jointly with the owning company was completely gone. And with it went the power to prescribe trackage rental terms.

The power to prescribe rental terms was based upon the power to prevent operation on other than approved terms. After the enactment of 1(18) the State Commission had no power to compel abandonment of operation. The jurisdiction over abandonment was exclusively in the Interstate Commerce Commission. In other words the question of continuing or discontinuing operation was entirely in the hands of the Interstate Commerce Commission and with it went the power to pass on the trackage rental terms.

Conclusion.

It is respectfully submitted that the decree below should be affirmed.

ALFRED A. GARDNER,
D. P. WILLIAMS,
JOSEPH F. KEANY,
of Counsel.

January 31, 1933.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 535

TRANSIT COMMISSION AND STATE OF NEW YORK, appellants

v.

THE UNITED STATES OF AMERICA, THE LONG ISLAND Railroad Company, the Pennsylvania Railroad Company, and the Interstate Commerce Commission

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 564) is reported in 1 Fed. Supp. 595. The original report of the Commission, Division 4 (R. 15), is reported in 162 I. C. C. 218, and its report on further hearing, likewise by Division 4 (R. 37), in 180 I. C. C. 439.

JURISDICTION

The decree of the District Court was entered October 20, 1932. (R. 580.) Petition for appeal was filed November 9, 1932, and was allowed on the same day. (R. 583, 584.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

(1) Whether the operation by one interstate carrier over the tracks of another, under a trackage agreement, may constitute the operation of a line of railroad by the former, or the extension of its line of railroad, within the meaning of Section 1 (18) of the Interstate Commerce Act, as amended.

(2) Whether the jurisdiction over extensions and operations granted to the Interstate Commerce Commission by Section 1 (18) is exclusive, and includes the power, previously governed by State law, to consider the reasonableness of the terms of the agreement between the carriers involved in so far as they affect the public.

(3) Whether, if the Commission's jurisdiction extends over operations under trackage rights, it has jurisdiction over an agreement entered into subsequent to the enactment of Section 1 (18) where operation over the tracks in question commenced,

under an agreement which has expired, prior to the enactment of this section.

STATUTE INVOLVED

Pertinent provisions of the Interstate Commerce Act, as amended, are printed in the Appendix *infra*, pp. 35–37.

STATEMENT

This is a direct appeal from a decree of a specially constituted district court denying motions for a preliminary injunction and dismissing the suits of appellants brought to set aside an order of the Interstate Commerce Commission. (R. 580, 584.) The order certifies that present and future public convenience and necessity require that the Long Island Railroad Company continue to operate, under trackage rights, over a portion of the railroad of the Pennsylvania Tunnel and Terminal Company, and share in the use of its terminal facilities, as provided in an agreement between the parties dated December 23, 1930. (R. 547.) The order was not to become effective unless the carriers agreed within a specified time to reduce the basic term of their agreement from 20 years to 5 years, and to make certain modifications in the manner of computing the rental. (R. 547–548.) The carriers accepted these conditions and modified their trackage agreement accordingly, filing a copy of the modified agreement dated March 10, 1932, with the Commission. (R. 551–562, 563–564, 576–577.) After appellants had filed identical petitions

in the court below under the Urgent Deficiencies Act of October 22, 1913, the two suits were consolidated. (R. 1, 53, 580.) The Interstate Commerce Commission intervened as a party defendant. (R. 10, 54.)

Appellants do not question the sufficiency of the evidence to support the Commission's order, but seek to have determined only whether the issuance of the order was within the authority granted to the Commission by Paragraph 18 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920. The claim is that the carriers should have submitted their trackage agreement for approval to the Transit Commission, pursuant to State law, rather than to the Interstate Commerce Commission. The material facts are found in the findings of fact of the court below (R. 572–577) and in the two reports of the Interstate Commerce Commission by Division 4 (R. 15–36,[1] 37–46[1]).

The Pennsylvania Railroad Company owns all the capital stock of the Pennsylvania Tunnel and Terminal Company and practically all of the capital stock of the Long Island Railroad Company. (R. 573.) These companies will be hereinafter respectively referred to as the Pennsylvania, the Terminal Company, and the Long Island. The Pennsylvania and the Long Island are carriers

[1] The same reports are reprinted in the record at pages 334–356 and 537–546.

by railroad subject to the provisions of the Interstate Commerce Act. (R. 15–16.) The Pennsylvania operates the properties of the Terminal Company under a long-term lease pursuant to authority granted by the Interstate Commerce Commission in 1928. (R. 16; *Acquisition of Control by Pennsylvania Railroad,* 145 I. C. C. 283.) These properties consist of the Pennsylvania Station and yard, located in midtown Manhattan, of two single-track tunnels running westerly under the city and the Hudson River into New Jersey, of four single-track tunnels running in an easterly direction under the city and the East River, and of the Sunnyside Yard in the Borough of Queens. (R. 573.) The Long Island trains come from the east through the tunnels under the East River into Pennsylvania Station, load again and start back east. (R. 575.) Since a majority of the passengers are commuters, a number of trains remain in the Pennsylvania Station during the middle of the day. (*Ibid.*)

For the purpose of determining the relative use of the Terminal Company's facilities by the Long Island and the Pennsylvania, that portion of the facilities which is affected by the Long Island's operation is divided into three zones. (R. 20–21, 574.) Zone 1 includes the station proper and adjacent yards between Sixth and Tenth Avenues in Manhattan; Zone 2 comprises the four single-track tunnels extending under the East River, two of

which are used exclusively by the Long Island, and tracks connecting with the tracks of the Long Island in the Borough of Queens; Zone 3 embraces the Sunnyside Yard used mostly by the Pennsylvania for storing its cars. (*Ibid.*) The investment in each zone as of July 1, 1928, and the so-called wheelage ratios, representing the proportion of Long Island cars handled in each of the three zones in 1930 as compared with cars of the Pennsylvania, including those of certain other carriers using the same facilities, are shown as follows (R. 38–39, 42, 575):

Zone 1	$46, 896, 746	42. 08%
Zone 2	$32, 603, 521	60. 49%
Zone 3	$8, 623, 170	7. 65%

Certain of the Terminal Company's facilities, particularly two of the tunnels under the East River, and tracks, platforms, and a waiting room in the station, appear to have been specially provided for the use of the Long Island when the Pennsylvania Station was built in 1910. (R. 19, 21.) A trackage agreement entered into at that time between the Long Island and the Pennsylvania was approved by the predecessor of the appellant Transit Commission, as required by State law. (R. 573.) A modification of this agreement in 1912 and several increases in rental between then and 1922 were similarly approved by the Transit Commission or its predecessor. (R. 573–574.)

In 1923 the Transit Commission was asked to approve a further increase in the rental. (R. 574.)

At the same time the Long Island applied for authority to increase its commutation fares. (*Ibid.*) At that time the Long Island was paying as annual rental its proportionate share, on a wheelage basis, of the operating expenses and taxes (less revenue received for station privileges) on the jointly used facilities and the station building, and in addition a fixed sum of $300,000. (*Ibid.*) An agreement was proposed whereby the Long Island, in lieu of the $300,000 payment, would pay an amount equal to its proportionate share, on a wheelage basis, of interest at 4% on the investment in the jointly used facilities, including the entire station building. (*Ibid.*) The Transit Commission declined to approve this proposed agreement, the effect of which would have been to increase the annual rental by over $1,000,000. (*Ibid.*)

In 1925 the rejected agreement was modified to exclude the station building above the track level, valued at $15,000,000, from the investment base and to eliminate from the rental also the operating expenses and taxes pertaining thereto;[2] but the rate of interest was increased to 5%. (R. 23, 575–576.) This modified agreement was approved by the Transit Commission in July of that year, with the interest rate reduced to 4%, and this approval was made retroactive to July 1, 1923. (*Ibid.*) Shortly thereafter an application to increase the interest

[2] This was probably due to the contention of the Transit Commission that the Long Island made little use of the station building above the track level. (R. 29.)

rate to 6% was denied by the Transit Commission, but an extension of the agreement as previously approved was granted for one year from January 1, 1926. (R. 576.)

The number of passengers handled annually by the Long Island more than trebled between 1911, when it commenced to operate into Pennsylvania Station, and 1930. (R. 19.) Its earnings rose from a deficit of $510,221 in 1920 to a net income of $4,682,656 in 1928. (*Ibid.*) The rental paid by it to the Pennsylvania increased from $519,173 in 1911 to $1,812,024[3] in 1923 and to $2,835,151 in 1928. (R. 574, 577.)

In 1929 the carriers applied to the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 1 (18) of the Interstate Commerce Act, as amended, authorizing the Long Island to continue to operate over the tracks of the Terminal Company, and for an order under Section 3 (4) of the Act requiring the Long Island to continue so to operate under terms embodied in an agreement between the Long Island and the Pennsylvania dated November 13, 1928. (R. 15–16, 576.) A hearing was held on this application at which the Transit Commission, the City of New York, and the Association of Long Island Commuters, Incorporated, intervened and were represented by counsel. (R. 15, 16.) The Interstate Commerce Commission, in a report by Division 4, held that Section 3 (4) was not appli-

[3] This figure is probably erroneous. In petitioner's Exhibit 6 (R. 139) the rental for 1923 is shown as $2,025,710.

cable to a voluntary arrangement between carriers, but that the Commission had jurisdiction under Section 1 (18). (R. 17–18.) The report states in part (R. 19):

> The power conferred upon us by the act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary. The case is brought to issue mainly because of the possibility of increased fares on the Long Island, but consideration of the questions of rental, degree of use, and the like which are now presented must be weighed entirely on the showing of fairness and reasonableness and should not be influenced by the contingency emphasized by the protestants. The Pennsylvania and the Long Island are entitled to equally fair treatment in the matter.

The Commission found that public convenience and necessity require the continued operation by the Long Island over the tracks of the Terminal Company, but that the terms of the proposed agreement between the carriers were not just and reasonable. An order was therefore entered (R. 36) denying that part of the application which was under Section 1 (18), without prejudice to the submission of a modified contract, and dismissing that part of the application requesting an order under Section 3 (4).

In December, 1930, the carriers renewed their application to the Interstate Commerce Commission under Section 1 (18) submitting a modified

agreement dated December 23, 1930, intended to remove the objections indicated by the Commission to the previous agreement. (R. 38, 576.) After further hearing, the Commission by Division 4 filed its second report on February 8, 1932 (R. 37–47), and issued the certificate previously described (*supra*, p. 3). This action of the Interstate Commerce Commission changed the existing arrangement between the carriers (which the Transit Commission had approved) in two particulars. (R. 39–45.) The rate of interest paid by the Long Island on its share of the investment in the jointly used facilities, other than the station building above track level, was increased from 4% to 5%. The Long Island by the new agreement assumed 20% of the operating expenses of the station building above the track level, that part of the station building having previously been wholly excluded in the computation of the rental.

The opinion of the court below (R. 564–572) holding that the petitions of appellants should be dismissed, stated that (R. 572):

> Jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island Railroad, when running its trains under the proposed trackage agreement (1) would be operating a "line of railroad" within the meaning of Section 1 (18); (2) would be undertaking the "extension of its line" and engaging "in transportation * * * by means of such extended line"; and (3) would be preventing an

abandonment, which might occur, if the railroads agreed to discontinue joint use of terminal facilities because of burdensome rulings of the State authorities.

SUMMARY OF ARGUMENT

I. The trackage agreement between the Long Island and the Pennsylvania gave the former the right to operate a line of railroad, and had the effect of extending its line of railroad, within the meaning of Section 1 (18). This Court has recognized in the past that the operation by one carrier over tracks used jointly with the owner falls within Section 1 (18) and requires the authority of the Interstate Commerce Commission. *Alabama & Vicksburg Railway Company* v. *Jackson & Eastern Railway Company*, 271 U. S. 244, 249–250; *Cleveland, Cincinnati, Chicago & St. Louis Railway Company* v. *United States*, 275 U. S. 404, 409–410.

Although the Interstate Commerce Commission was somewhat doubtful of its jurisdiction at the outset, it has uniformly held in numerous cases arising since early in 1925 that its jurisdiction under Section 1 (18) extends over operations under trackage rights. This uniform administrative construction over a period of 8 years is persuasive. Furthermore, consideration of the purposes of Section 1 (18), to preserve the financial resources and the earning capacities of interstate carriers, and to prevent wasteful competition, leaves little doubt that Congress intended the Commission to exercise jurisdiction over operations under track-

age rights. The power to regulate such operations is a necessary incident to the exercise by the Commission of its duty to maintain an adequate railway service. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 585; *New England Divisions Case,* 261 U. S. 184, 189; *Texas & Pacific Railroad Company* v. *Gulf, Colorado & Santa Fe Railway Company,* 270 U. S. 266, 277.

II. The Interstate Commerce Commission has exclusive jurisdiction under Section 1 (18) to determine whether proposed extensions, operations, or abandonments by interstate carriers are in the public interest. *Colorado* v. *United States,* 271 U. S. 153; *Transit Commission* v. *United States,* 284 U. S. 360. Local as well as national interests are committed to its care. The Commission is not limited, in a proceeding under Section 1 (18), to determining whether there is a need for the particular transportation service involved, but it has broad powers to consider all aspects of the proposed undertaking, in so far as it may affect the carriers involved or other carriers or the public at large. Thus, where, as in the instant case, a trackage agreement is entered into by two carriers which are under a common control, it is within the province of the Commission to inquire into the terms of the agreement and to consider the reasonableness of the rental fixed therein. Under Section 1 (20) of the Act, no approval other than

that of the Interstate Commerce Commission is required.

III. Section 1 (18) is applicable to a trackage agreement entered into subsequent to its enactment, even though operation commenced, under an earlier agreement since expired, prior to its passage. By the enactment of the Transportation Act all matters relating to extensions, operations, or abandonments by interstate carriers, except those enumerated in Section 1 (22), were placed under the jurisdiction of the Interstate Commerce Commission, and State laws previously applicable have been superseded. The claim that a State has jurisdiction over a trackage agreement between two interstate carriers relating to the joint use of terminal facilities, entered into subsequent to the enactment of the Transportation Act, is inconsistent with the comprehensive control over interstate carriers conferred upon the Commission by that Act. *Alabama & Vicksburg Railway Company* v. *Jackson & Eastern Railway Company,* 271 U. S. 244, *supra.*

ARGUMENT

I

SECTION 1 (18) OF THE INTERSTATE COMMERCE ACT COVERS THE OPERATION OR EXTENSION OF A LINE UNDER TRACKAGE RIGHTS

Section 1 (18), introduced into the Interstate Commerce Act by the Transportation Act, 1920, provides (*infra,* p. 35):

> no carrier by railroad subject to this Act shall undertake *the extension of its line of*

> *railroad,* or the construction of a new line of railroad, or shall acquire or *operate any line of railroad,* or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad

without first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission, and that no carrier subject to the Act "shall abandon all or any portion of a line of railroad, or the operation thereof," without obtaining a similar certificate. Under Section 1 (20) (*infra,* pp. 36–37) any unauthorized construction, operation, or abandonment may be enjoined at the suit of an interested party.

The Long Island is subject to the provisions of Section 1 (18). *Transit Commission* v. *United States,* 284 U. S. 360. Appellants' principal contention in this case is that the language of Section 1 (18) is not sufficiently broad to include operation under trackage rights. They appear to contend (brief, pp. 23–25) that "operation" of a line of railroad refers to the control and management of the tracks, so that if one company operates its trains over tracks owned and managed by another, the latter, but not the former, is operating a line of railroad. They maintain (brief, p. 19) that a line may be extended within the meaning of Section 1 (18) only by the construction of additional tracks, thus excluding all extensions by lease of existing tracks. The Interstate Commerce Commission and

the court below were of the view that the trackage agreement between the Long Island and the Pennsylvania gave the former the right to operate a line of railroad, and had the effect of extending its line of railroad, within the meaning of Section 1 (18).

In at least two cases this Court, without expressly so holding, has recognized that the operation of its line by one carrier over tracks used jointly with the owner, is subject to the approval of the Interstate Commerce Commission under Section 1 (18). The Interstate Commerce Commission has similarly construed this section in numerous cases since 1924, and the propriety of that construction seems evident from the face of the statute, particularly when considered in the light of its broad purposes.

In *Alabama & Vicksburg Railway Company* v. *Jackson & Eastern Railway Company,* 271 U. S. 244, involving the question whether the Interstate Commerce Commission has exclusive jurisdiction over junctions between the main lines of interstate carriers, this Court held that although the Transportation Act did not in specific terms confer that jurisdiction, "it is clear that the comprehensive powers conferred extend" to junctions such as those there in question. The Court supported its conclusion, in part, by the close relationship which it said existed between junctions of railroad lines and the joint use of trackage, stating (p. 250):

> Moreover, the establishment of junctions between the main lines of independent car-

> riers is commonly connected with the establishment of through routes and the interchange of car services, and *is often but a step toward the joint use of tracks. Over all these matters the Commission has exclusive jurisdiction.* (Italics ours.)

The Court also stated (pp. 249, 250):

> The only limitation set by Transportation Act, 1920, upon the broad powers conferred upon the Commission over the construction, extension, and abandonment of the lines of carriers in interstate commerce, is that introduced as paragraph 22 of Section 1, which excludes from its jurisdiction "spur, industrial, team, switching or side tracks, located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."
>
> * * * * *
>
> In matters relating to the construction, equipment, adaptation and use of interstate railroad lines, with the exceptions specifically set forth in paragraph 22, Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment.

In *Cleveland, Cincinnati, Chicago & St. Louis Railway Company* v. *United States,* 275 U. S. 404, the "Big Four" attacked an order of the Commission under Section 1 (9) of the Act requiring it to construct a switch connection with the side track

of a coal company which was already served by another carrier. It contended that the side track of the shipper would become an extension of its line into territory served by another carrier, thus requiring a certificate under Section 1 (18). This Court pointed out (p. 409) that Section 1 (18) does not apply to side tracks built by a shipper, and added:

> Furthermore the order gave the Big Four no trackage rights over the Coal Company's track.

The further contention was made that two other carriers, whose tracks the side track of the Coal Company crossed at grade, had an agreement with the Coal Company permitting them to connect their lines with and move their trains over, the side track, thus converting it into an extension of the lines of the other carriers. As to this contention, this Court said (pp. 409–410):

> The argument is that because of the possibilities of the use of the track by these other carriers, it is an extension within the meaning of paragraph 18. *Texas & Pacific Ry Co.* v. *Gulf, Colorado & Santa Fe Ry. Co., supra.* But no such connection has been made or attempted or threatened; and neither the Illinois Commerce Commission nor the Interstate Commerce Commission has authorized such connection or use. *If the track is used by the Illinois Central or the Southern Illinois in the manner described, paragraph 20 of Section 1 furnishes*

> *the appellant with an appropriate remedy. Texas & Pacific Ry Co. v. Gulf, Colorado & Santa Fe Ry Co., supra.* (Italics ours.)

See also *Cleveland, Cincinnati, Chicago & St. Louis Railway Company* v. *Illinois Commerce Commission*, 315 Ill. 461.

As previously stated, the Interstate Commerce Commission has uniformly held in numerous cases since early in 1925 that agreements providing for the operation of its trains by one carrier over the tracks of another are subject to its approval under Section 1 (18).[4] By emphasizing certain early decisions of the Commission, and minimizing the many cases decided since 1924, appellants' brief (pp. 33–39) fails to present fully the history of the administrative application of Section 1 (18) to

[4] Many of these cases are collected in a footnote in *Chicago & Alton Railroad Company* v. *Toledo, Peoria and Western Railroad Company*, 146 I. C. C. 171, 181, *infra*. In addition to the cases there cited, see *Operation of Line By Pearl River Valley Railroad Company*, 111 I. C. C. 580; *Abandonment of Line By Chicago, Rock Island & Pacific Railway Company*, 131 I. C. C. 421; *Operation Under Trackage Rights By Northern Pacific Railway Company*, 138 I.C.C. 405; *Control and Operation of Louisville & Jeffersonville Bridge & Railroad Company*, 145 I. C. C. 131; *Operation of Lines By Louisiana & Arkansas Railway Company*, 145 I. C. C. 228; *Operation of Subway Railroad By New York State Railways*, 145 I. C. C. 269; *Operation of Line By Oregon Short Line Railroad Company*, 150 I. C. C. 78; *Operation Under Trackage Rights By Baltimore & Eastern Railroad Company*, 150 I. C. C. 377; *Unified Operation of Railroad Facilities at Los Angeles Harbor*, 150 I. C. C. 649, 660; *Operation and Abandonment By Chicago Great Western Railroad Company*, 150 I. C. C. 666.

trackage agreements. It is true that at the outset the Commission was somewhat doubtful of its jurisdiction in these cases. In four early cases,[5] three decided in 1921 and one in 1923, the Commission held, without discussion, that Section 1 (18) did not apply to trackage agreements, and in *Chesapeake & Ohio-Norfolk & Western Trackage Rights,* 72 I. C. C. 471, decided in 1922, the question whether the Commission had jurisdiction over trackage agreements was said to be an open question. In *Operation of Line by Illinois Central,* 72 I. C. C. 111, and in *Missouri-Kansas-Texas Reorganization,* 76 I. C. C. 84, both decided in 1922, the Commission issued certificates relating to trackage rights, but without discussion of the question of jurisdiction.

In *Operation of Line By Atchison, Topeka & Santa Fe Railway,* 94 I. C. C. 318, decided in 1924, a certificate was issued over the objection of the applicant that neither the letter nor the spirit of Section 1 (18) required it to secure a certificate to operate under trackage rights. In denying the motion of the applicant to dismiss on the ground of lack of jurisdiction, the Commission stated (p. 320) that the proposed operation was more than an operation under ordinary trackage rights,

[5] *In the Matter of the Application of The Texas, Oklahoma & Eastern Railroad Company,* 67 I. C. C. 484; *In the Matter of the Application of the Copper Range Railroad Company,* 67 I. C. C. 502; *The Cleveland Passenger Terminal Case,* 70 I. C. C. 659; *Operation of Sherman, Shreveport & Southern Railroad,* 76 I. C. C. 771.

being in the nature of a joint operating contract. If the fact is material, the trackage agreement here in question is even more in the nature of a joint operating contract than was the agreement in that case.

In all cases decided since the *Atchison, Topeka & Santa Fe case,* the Commission has held, without qualification, that it has jurisdiction over extensions, operations, or abandonments of operations under trackage rights (Footnote 4, *supra,* p. 18). Any doubt which may have existed due to the early decisions of the Commission has long since been dispelled by the uniform administrative construction during the past eight years. If the statute can be regarded as ambiguous, this long continued administrative construction should be persuasive. See *The New York Central Securities Corporation* v. *United States,* 287 U. S. 12, 24.

Appellants (brief, pp. 36, 37, 38) appear to rely upon the fact that in the past the State authorities have not generally objected to the exercise of jurisdiction by the Interstate Commerce Commission in these cases. But the failure of the States to object may reflect merely their acquiescense in the interpretation of the Act adopted by the Commission. Appellants' assertion (brief, p. 25) that the instant case is the first in which the Commission has sustained its own jurisdiction over active opposition is negatived by *Proposed Operation Under Trackage Rights of Northern Pacific Railway Company,* 111 I. C. C. 689, in which the Com-

mission sustained its jurisdiction over trackage rights under Section 1 (18) over the objection of two municipalities which intervened to object to its exercise of jurisdiction.

In *Chicago & Alton Railway Company* v. *Toledo, Peoria & Western Railway Company,* 146 I. C. C. 171, decided in 1928, where the question was presented whether the Commission may refuse to authorize the abandonment of operation under trackage rights after the expiration of the agreement creating those rights, the application of Section 1 (18) to trackage rights was fully considered. The Commission said in part (pp. 180–181):

> The public interest in transportation lies primarily in the operation of railroads rather than in the facilities themselves. Operation under lease may comprise the entire operation of a line or any portion of such operation, and the public interest therein is obvious, the extent varying with the circumstances. It could not be maintained that the word "operation" as here used must be construed to mean exclusive operation, since under such construction it would be possible for joint operators, without securing permission, severally to abandon operation and thus leave the public entirely without service. It is rather to be believed that the word "operation" as used in the statute, has reference to the movement of railroad equipment, through which alone the public is served, and that the word embraces partial operation as well as complete operation. We

> have never considered the precise question here presented but we have in many cases exercised jurisdiction over the commencement of joint operations under agreements similar to that here before us.[6]

Even if the application of Section 1 (18) to trackage rights be still regarded as an open question, it seems unreasonable to believe that Congress intended that extensions and abandonments by carriers of operations over tracks controlled by them should be subject to the approval of the Interstate Commerce Commission, but that extensions or abandonments of operations under trackage rights should be left to be regulated by the States. In *Texas & New Orleans Railroad Company* v. *Northside Belt Railway Company*, 276 U. S. 475, this Court said (p. 479):

> The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest.

If the Interstate Commerce Commission lacks jurisdiction over trackage rights, carriers are free to extend their operations by trackage agreements and to create competition in excess of that required in the public interest. Tracks authorized to be built to provide a particular service may be di-

[6] Here numerous cases are cited; see Footnote 4, *supra*, p. 18.

verted to an entirely different service without the power of the Interstate Commerce Commission to prevent it. The Commission would have no power to prevent the abandonment of operations under trackage rights where such operations are required in the public interest, and would lack power to authorize abandonment of such operations, over the objections of the States, where continued operations might, because of losses being sustained, endanger the ability of carriers to serve interstate commerce. The power to regulate trackage rights is, we submit, a necessary incident to the proper exercise of the affirmative duty imposed on the Interstate Commerce Commission by the Transportation Act to maintain an adequate railway service for the people of the United States. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 585; *New England Divisions Case,* 261 U. S. 184, 189; *Texas and Pacific Railway Company* v. *Gulf, Colorado and Santa Fe Railway Company,* 270 U. S. 266, 277.

Appellants attempt to dispute the broad purposes ascribed by this Court to Section 1 (18) by referring (brief, pp. 29–33) to portions of the legislative debates which, they assert, leave no doubt that "the provision must be construed as applying only to construction." But while the legislative history referred to may reveal a dominant purpose to prevent wasteful construction, this obviously

was not the sole purpose for, in addition to construction, Section 1 (18) deals specifically with operation and abandonment. It appearing from the face of the statute that its purposes are obviously broader than those mentioned in the legislative debates referred to by appellants, those debates are not helpful in determining the scope of the legislative intent.

The arguments of appellants founded upon comparison of Section 1 (18) with other provisions of the Act are equally without force. It is said that under paragraph 21 of Section 1, providing for compulsory extensions of lines, one carrier could not be compelled to grant trackage rights over its tracks to another; that an extension under paragraph 21 must be the same as under paragraph 18; and that, therefore, there can be no extension within paragraph 18 by operation under trackage rights. But the fact that a particular form of extension may not be compelled is no reason why it should not be regulated if undertaken voluntarily. Thus, although a carrier probably could not be compelled under Section 1 (21) to lease its tracks to another, we think it not open to doubt that the acquisition by a carrier, by agreement, of the exclusive use of tracks adjoining its own, would effect an extension of its line within the meaning of Section 1 (18).

There is no warrant for the statement (brief, p. 20) that operations under trackage rights are

"as a matter of common knowledge" generally of slight extent and importance. One of the difficulties encountered by the court below with the construction contended for by appellants, was (R. 570) that it would "prevent national control of such important arteries of interstate commerce as are railroads using the tracks of other railroads engaged therein." Congress regarded the joint use of terminal tracks of such vital importance that it empowered the Interstate Commerce Commission under Section 3 (4) to compel terminal companies to share their tracks. That trackage rights may also be important apart from the joint use of terminal tracks is illustrated in *Chesapeake & Ohio-Norfolk & Western Trackage Rights,* 72 I. C. C. 471, *supra,* where the Commission found (p. 472) that certain trackage rights enjoyed by the Chesapeake & Ohio "form, to all intents and purposes, a part of" its main line and that their discontinuance would disrupt its entire system.

Finally, if appellants' position is sound, approval of the construction or abandonment of tracks must be sought from the Interstate Commerce Commission, and approval of the acquisition or abandonment of trackage rights must be obtained from State authorities, even though both may often form part of a single undertaking.

II

THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION UNDER SECTION 1 (18) OVER A TRACKAGE AGREEMENT IS EXCLUSIVE AND EXTENDS OVER ALL PROVISIONS THEREOF, INCLUDING THOSE FIXING THE RENTAL

In a proceeding under Section 1 (18), the Commission is not limited to consideration of the need for the particular transportation service involved. Equally important among the broad purposes of Section 1 (18) are the preservation of the earning capacity, and the conservation of the financial resources, of the carriers. *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company,* 270 U. S. 266, *supra; Colorado* v. *United States,* 271 U. S. 153; *Texas & New Orleans Railroad Company* v. *Northside Belt Railway Company,* 276 U. S. 475, *supra.* It would seem, therefore, that the Commission in this case was empowered to examine into the terms of the trackage agreement as well as into the character of the proposed operations, and, when it found that certain terms of the agreement were unfair to one of the carriers, to make its order conditional on their modification (*supra,* pp. 3, 9, 10). This authority would appear to have been specifically provided for in paragraph 20 of Section 1, which provides in part (*infra,* p. 36):

> The Commission shall have power to issue such certificate as prayed for, * * *

> and *may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.* From and after issuance of such certificate, and not before, the carrier by railroad may, *without securing approval other than such certificate,* comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby.

The provision authorizing the Commission to fix the "terms and conditions" on which its approval may be had, and the further express provision that no approval apart from the certificate of the Commission shall be required, show that no approval by a State is necessary.

Appellants' contention is (brief, pp. 50–57) that since the purpose of Section 1 (18) is to prevent interstate carriers from weakening themselves, the Interstate Commerce Commission is limited to considering whether the effect of a trackage agreement may be to weaken any of the carriers involved. The answer to this contention is found in the *Colorado case, supra,* and in *Transit Commission* v. *United States,* 284 U. S. 360. The *Colorado case* sustained the validity of an order of the Commission under Section 1 (18) authorizing the abandonment by an interstate carrier of a branch line

located within the State of Colorado. In rejecting a contention analogous to that made here, this Court said (pp. 167–168):

> While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. *The sole test prescribed is that abandonment be consistent with public necessity and convenience.* In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. (Italics ours.)

In the instant case, the Interstate Commerce Commission has plenary jurisdiction to determine whether the trackage agreement in question meets the test of public convenience and necessity. The local as well as the national interest is committed to its care. To insure due consideration of the local interests Section 1 (19) provides for notice to the State authorities and other interested persons, with

an opportunity to be heard. See *Colorado* v. *United States, supra,* at p. 167.

Appellants assert that the rental paid by the Long Island to the Pennsylvania affects directly the intrastate commutation fares of the Long Island and is, therefore, primarily of local concern. But the interstate rates of the Pennsylvania will likewise be affected if it is required to sustain more than its fair share of the costs of the jointly used facilities. As stated in the report of the Commission (R. 19):

> The Pennsylvania and the Long Island are entitled to equally fair terms in the matter.

In the *Transit Commission case, supra,* this Court held that the Interstate Commerce Commission had exclusive authority over the abandonment by the Long Island of its Whitestone branch, although the abandonment affected primarily intrastate commerce.

If, as we contend, the jurisdiction of the Interstate Commerce Commission is complete and exclusive, there can be no question of the validity of the conditions attached to its order. This case is unlike *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 282 U. S. 311, where the condition of the Commission's order which was held invalid was found to affect the terms of a contract between private persons not parties to the proceeding before the Commission and involving a subject matter beyond the reach of the Federal power. The agreement in-

volved in the instant case is one between the carriers themselves, and its terms have a distinct bearing upon the issues before the Commission (*supra*, pp. 26–28).

III

THE INTERSTATE COMMERCE COMMISSION HAS JURISDICTION OVER A TRACKAGE AGREEMENT BETWEEN INTERSTATE CARRIERS ENTERED INTO SUBSEQUENT TO THE ENACTMENT OF THE TRANSPORTATION ACT, 1920, ALTHOUGH OPERATION OVER THE TRACKS IN QUESTION COMMENCED, UNDER AN EARLIER AGREEMENT, PRIOR TO THE PASSAGE OF THAT ACT

Appellants maintain (brief, pp. 39–49) that the Interstate Commerce Commission lacked jurisdiction over the trackage agreement in this case because the Long Island commenced to operate over the tracks here in question prior to the enactment of Section 1 (18). The agreement which was presented to the Interstate Commerce Commission for approval was dated November 13, 1928. (R. 576.) The previously existing contract between the carriers expired on December 31, 1925, and was extended for one year. (R. 17.) Desiring to enter into a more permanent arrangement, the carriers sought the authority of the Interstate Commerce Commission to enter into a 20-year agreement. (*Ibid.*) The Commission approved an agreement for 5 years. (*Supra*, p. 3.) The claim of appellants is that the carriers should have sought the approval of their trackage agreement from the Transit Commission.

The question thus presented is whether a trackage agreement between two interstate carriers

relating to the joint use of terminal facilities, entered into subsequent to the enactment of the Transportation Act, 1920, is subject to regulation by the State or by the Interstate Commerce Commission. It is our view that with the enactment of Section 1 (18) in the exercise of the paramount federal power over interstate commerce, all matters pertaining to extensions, operations, or abandonments by interstate carriers, apart from those enumerated in paragraph 22 of Section 1 (*infra*, p. 37), fell under the jurisdiction of the Interstate Commerce Commission, and that applicable State laws have been superseded. We submit that the present case is governed in this respect by *Alabama & Vicksburg Railway Company* v. *Jackson & Eastern Railway Company*, 271 U. S. 244, *supra*. There the Jackson & Eastern claimed the right under a State statute to construct a junction between its tracks and those of the Alabama & Vicksburg and to exercise the right of eminent domain for that purpose. In a suit brought to enjoin eminent domain proceedings commenced by the Jackson & Eastern, the Alabama & Vicksburg contended that the Interstate Commerce Commission, since the Transportation Act, had exclusive authority over physical connections between interstate railroads. The decision of the Supreme Court of Mississippi that Congress had failed to take full control of the subject and that the State statute remained in full force and effect, was reversed by this Court. Referring to the enactment of the Transportation Act, this Court said (p. 248):

> Since then the authority of the Interstate Commerce Commission has been greatly enlarged and the power of the States over interstate carriers correspondingly restricted. Prominent among the enlarged powers of the federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another. While none of the amendments in specific terms confers upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question.

In the instant case the claim that a State commission has jurisdiction over a trackage agreement between interstate carriers entered into subsequent to the enactment of the Transportation Act, is inconsistent with the extensive control over interstate carriers conferred upon the Interstate Commerce Commission by that Act.

What has previously been said (*supra*, pp. 26–29) with reference to the scope of the authority of the Interstate Commerce Commission under Section 1 (18), negatives appellants' assertion (brief, p. 45) that "The thing assumed to be embraced by Section 1 (18) was operation, not written agreements." Since the jurisdiction of the Interstate Commerce Commission embraces the terms of the operating agreement as well as the operation itself,

it is submitted that the Commission's authority extends over an agreement executed since the passage of Section 1 (18).

Appellants rely upon the literal meaning of the words used in the statute, but the purpose of the Transportation Act to develop and maintain an adequate railway system for the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. *Piedmont and Northern Railway Company* v. *Interstate Commerce Commission,* 286 U. S. 299, 311. As the Court there indicated, the Transportation Act was remedial legislation and should, therefore, be given a liberal interpretation.

The facts in *Detroit Terminal Railroad Company* v. *Pennsylvania-Detroit Railroad Company,* 15 F. (2d) 507, are essentially different from those presented here. In that case, suit was brought under Section 1 (20) to enjoin construction of a line of railroad, the construction of which had not been approved by the Interstate Commerce Commission, but had been undertaken prior to the enactment of Section 1 (18). To have prevented the completion of the project would have materially impaired the value of track already laid at an expenditure of many millions of dollars. The court held that since the construction had been undertaken in good faith prior to the passage of the Transportation Act, and was substantially completed, a certificate under Section 1 (18) was not

required for its completion. The *Detroit Terminal case* might be applicable if the Commission were seeking to regulate the terms of an agreement entered into prior to the Act. It might then be argued that the Act should not be held to apply retroactively to rights and obligations created in good faith before it was passed. Here, however, the only rights and obligations affected by the Commission's order have come into being since the statute was enacted and are, therefore, subject to its terms.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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MARCH, 1933.

APPENDIX

The Interstate Commerce Act, as amended by the Transportation Act, 1920, provides in part:

> Section 1 (18). After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. (C. 91, 41 Stat. 477, U. S. C., Title 49, Sec. 1 (18).)
>
> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this

Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (19).)

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the

United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * * (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (20).)

* * * * *

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (22).)

* * * * *

Section 3 (4). If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. * * * (C. 91, 41 Stat. 479; U. S. C., Title 49, Sec. 3 (4).)

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SUPREME COURT OF THE UNITED STATES.

No. 535.—October Term, 1932.

Transit Commission and the State of New York, Appellants, *vs.* The United States of America, The Long Island Railroad Company, The Pennsylvania Railroad Company, and the Interstate Commerce Commission.	Appeal from the District Court of the United States for the Southern District of New York.

[April 10, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

Each appellant sued the United States and the railroad companies to set aside an order made by the Interstate Commerce Commission under § 1 (18) of the Interstate Commerce Act. The Commission intervened. The order certifies that the present and future public convenience and necessity require that upon terms specified the Long Island continue to operate over tracks, and to share in the use of other facilities, of the Pennsylvania Tunnel and Terminal Railroad Company. Appellants applied for a temporary injunction, the cases were consolidated, the evidence before the Commission was introduced and, the cases having been submitted on such application and upon the merits, the court made findings of fact, stated its conclusions of law and entered a decree that the preliminary injunction be denied and that the bills be dismissed. 1 F. Supp. 595.

Appellants contend that the use by the Long Island of the terminal company's tracks and facilities is not within the jurisdiction of the Interstate Commerce Commission but is governed by § 148 of the New York Railroad Law. That section provides that subject to the permission and approval of the public service commission (the transit commission is its successor) any corporation owning or operating a railroad route may contract with any other such corporation for the use of their respective roads. And appellants maintain that the Interstate Commerce Commission was

not authorized to issue the certificate: that § 1 (18) does not apply to railroad operation under trackage rights; that, if it does, it is not retroactive and does not apply to a use which began before the enactment, and that the Commission is without power, to the exclusion of the state authorities, to pass on or prescribe the terms and conditions of the agreement made by the carriers to govern such operation.

The Pennsylvania railway station and yards in midtown Manhattan constitute the eastern terminus of that system. In addition to such station and yards the terminal properties include four single-track tunnels extending easterly under the city and East river, the Sunnyside yards in Queens, and connecting lines. The Long Island Railroad connects with that yard. The legal title of the terminal properties is in the terminal company. The Pennsylvania Railroad Company is its lessee and owns all its stock and practically all that of the Long Island.

The station was opened for use in 1910 and in September of that year the Long Island commenced to operate its trains over the terminal lines of railroad through the tunnels to and from the station and yards in Manhattan. This operation was pursuant to an agreement made by the carriers for which they obtained the approval of the first district state public service commission. The rental payable by the Long Island was, in 1920 and again in 1922, increased with the approval of the public service commission and, after 1921, of its successor, the transit commission. In 1923 the carriers sought approval of an amendment of the agreement that would involve a further increase. The application was denied. In March, 1925, the carriers submitted another agreement. After modification to lessen the proposed rental, the transit commission, July 28, 1925, approved. In November the carriers made application for approval of a higher charge. In December the commission disallowed it but granted extension to January 1, 1927, of the agreement which it had approved July 28, 1925.

In 1929 the carriers, invoking § 1 (18), applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing the Long Island to continue operation at the rental rejected by the transit commission in December, 1925. The Interstate Commerce Commission held that it had jurisdiction but denied the application without prejudice upon the ground

that the agreement imposed unreasonable terms on the Long Island. 162 I. C. C. 218. December 27, 1930, the carriers submitted a proposed agreement somewhat more favorable to the Long Island. February 8, 1932, the Commission approved and subject to conditions specified granted the certificate. 180 I. C. C. 439. The carriers accepted the prescribed terms. In addition to the facts above stated, the court found that between January 1, 1927, and the consummation of the agreement pursuant to the certificate, the Long Island was a tenant at will and that the carriers continued during that period to operate under the conditions approved July 28, 1925.

The Commission found, and it is conceded, that public convenience and necessity require that the Long Island continue to use the lines and other facilities covered by the trackage agreement. It declared that the reasonableness of a joint facility rental is a matter of public interest, as well as one affecting the operations of the carriers, and should be considered in deciding upon public convenience and necessity; that the financial, as well as the transportation features of the carriers' application, might be dealt with under the authority conferred by § 1 (18) and that in cases of extensions of operations under trackage rights, the cost is not less important than in cases of extension by construction, acquisition, or lease. Appellants raise no question as to the sufficiency of the evidence to sustain the order or as to the reasonableness of the rentals or other terms of the agreement.

The district court found that operation under trackage agreements over existing lines of another carrier may affect interstate commerce; that an extension, whether arising out of such agreements or otherwise, has a vital effect on such commerce and that the same dangers that are to be guarded against when a railroad extends its line for its own use, or leases it for the sole use of another, exist where it agrees to a joint use by itself and another road. And upon a consideration of the language of § 1 (18) in the light of facts found and of settled governmental policies in respect of the regulation of interstate transportation, the court concluded that the case is within the statute; that the federal commission had jurisdiction over the trackage agreements and that § 148 of the New York Railroad Law no longer applies.

Section 1 (18) was added by Transportation Act, 1920. It provides: "No carrier . . . shall undertake the extension of its

line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad . . .". The paragraph also declares that no carrier shall abandon the operation of any portion of a line of railroad until it obtains the Commission's certificate that public convenience and necessity permit it. Paragraph (20) authorizes the Commission to impose such terms and conditions as in its judgment the public convenience and necessity may require, and provides that "without securing approval other than such certificate" the carrier may "proceed with the construction, operation, or abandonment covered thereby".

These provisions do not specifically mention trackage agreements providing for joint use of railroad lines, tracks or other facilities by two or more carriers. The question is whether the general language of paragraph (18) includes the arrangement under consideration. Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation had been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for. *The Minnesota Rate Cases,* 230 U. S. 352, 433. And it was everywhere known that enormous sums had been expended by interstate railroad carriers for the construction and operation of lines that were not needed or likely to be needed. Such investments had brought financial ruin to some and had made doubtful the power of many to continue operation in other than flush times. Need for effective regulation in this field had become urgent, and undoubtedly the Congress, by the provisions above referred to, intended to confer upon the Commission plenary power to limit interstate carriers' expenditures for construction or operation to lines of railroad reasonably necessary for the service of the public.

So far as concerns the purpose to be attained by this legislation, there is no room for a distinction between unjustifiable expenditures for the construction or operation of new mileage on the one hand and inadequate rentals or extortionate exactions under trackage agreements on the other. The reasons for the exertion of federal authority, to the exclusion of state regulation, apply with like force to both. The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 585, 589-590. *New England Divisions Case*, 261 U. S. 184, 189. *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331, 343. *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 277. *Colorado* v. *United States*, 271 U. S. 153, 163. *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244, 249.

The words employed are broad enough to include the Long Island operations under the trackage agreement. The phrase "to operate any line of railroad" seems quite sufficient to include such use. There is nothing to suggest that the "operation" for which the commission's approval is required may not be by other than the owner or lessee of the line or that it is to be limited to exclusive use. For more than a score of years the Long Island has used these lines for the passage of frequent trains carrying an enormous and ever increasing traffic between the terminus of its owned railroad at Sunnyside and the Pennsylvania station. It is no stretch to say that it has been operating such lines or that they constitute an "extension" of its own railroad. The use is a joint one but it is nevertheless "operation". And the phrase, "engage in transportation . . . by means of such additional or extended line of railroad" reasonably may be deemed to include a line owned by another carrier. The Long Island's use of the Pennsylvania lines covered by the agreement serves the same purpose as would the acquisition of such lines by purchase or the construction by it of a like extension into Manhattan. The provision as to abandonment is also significant for, if the Long Island were to cease to use the lines covered by the agreement, it reasonably might be held to have abandoned a "portion of a line of railroad". Any interpretation excluding the lines of railroad in question would conflict with implications of our decisions. *Alabama Ry.* v. *Jack-*

son Ry., supra, 250. *Cleveland, etc., Ry.* v. *United States,* 275 U. S. 404, 409. The provisions of paragraph (18) undoubtedly apply to the operations under trackage agreements such as that under consideration.

There is no merit in appellants' contention that, because the joint use commenced prior to the Transportation Act and has since been continuous, the provisions of paragraph (18) do not apply. The extended term of the contract approved by the state commission expired January 1, 1927. The agreement submitted to the Interstate Commerce Commission for approval was made long after such expiration and when there was no agreement for continuing joint operation or use of the lines and other facilities. On the taking effect of the Transportation Act the state commission was stripped of power to prescribe terms for such operation. The authority of the Interstate Commerce Commission is paramount and, in respect of the operation and agreement under consideration, it is necessarily exclusive.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.